93-488

Supreme Court, U.S.
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No. 93-___

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

v.

MARGARET L. ROULETTE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Is Due Process violated when California Civil Code §§ 831 and 1112 regarding the presumptions of ownership of an adjacent roadway are applied absent a *"rational relation"* to California Gov't. Code §§ 66410, et seq. (i.e., Subdivision Map Act), for purposes of determining an illegal subdivision?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, James E. Smith, an individual, and the Respondents, Margaret L. Roulette, S. Scott Emsley and Robin S. Emsley, individuals.

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Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State of California

PETITION FOR WRIT OF CERTIORARI

The Petitioner James E. Smith respectfully prays that a writ of certiorari issue to review the June 9, 1993, opinion, modified on July 1, 1993, of the Court of Appeal, Fourth Appellate District, Division One, State of California, in the above-captioned proceeding; or summarily reverse the opinion with appropriate instructions.

OPINIONS BELOW

The California Supreme Court on August 25, 1993 denied the Petition for Review which was not reported

and is reprinted in the Appendix hereto at Appendix page A-1[1].

The Opinion of the Court of Appeal, Fourth Appellate District, Division One, dated June 9, 1993, was not reported, and is reprinted at App. B-27-42; and was modified by order on July 1, 1993 (App. at B-43-44), after the June 22, 1993 Petition for Rehearing (App. at E-1-30).

The Order after court hearing of the Superior Court of San Diego County, dated April 15, 1992, was not reported, and is reprinted at App. F-1-3.

STATEMENT OF JURISDICTION

Petitioner seeks review of the July 1, 1993 Modified Opinion of the Court of Appeal, Fourth Appellate District, Division One. The U. S. Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment at § 1 of the United States Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law . . . "

[1] Hereinafter "App. at A . . . P and p #".

The substance of the rule of construction almost everywhere recognized, and which in a minority of cases is characterized as a rule of presumption, is that if land abutting on a roadway is conveyed by a description effective to cover it, the grantee, as part and parcel of the grant, takes title to the center line of the roadway if the grantor owns so much, unless an intention to the contrary sufficiently appears.

In California this doctrine is codified as a rebuttable presumption at California Civil Code §§ 831 and 1112 which were enacted in 1872.

The provisions of the Map Act (California Gov't. Code), explored herein are §§ 66499.32 and 66424. The former provision deals with the Map Act's exemption from a "rescission action" those sellers of property who identify the property by reference to a recorded final map. The latter provision defines what a "subdivision" is. Both of these statutes were interpreted and applied by the Court below to Petitioner in such a way that they are rendered unconstitutionally vague.

REQUEST FOR JUDICIAL NOTICE

Petitioner hereby requests this Court to take Judicial Notice of Case No. 93-163, filed in this Court on August 2, 1993; and Case No. 93-359, filed in this Court on September 2, 1993, involving the same lots H, I and J, Map No. 1285, as well as, Lot U, Map No. 1343, and Court's below.

STATEMENT OF THE CASE

This case involves (3) lots (i.e., lots H, I, and J, Map No. 1285), in the City of Del Mar, California which among other land was subdivided by Final Map No. 1285 in 1910 (App. at O-1-2).

On 4/15/88 and 6/14/88 Petitioner sold the (3) lots to Respondents after Respondents received assurance of "buildable" lots from the City of Del-Mar (App. at N-1-4). Petitioner purchased the lots on December 9, 1977 (App. at P-1-4).

In accordance with California law regarding the presumptions of §§ 831 and 1112 of the Civil Code, Petitioner expressly manifested an intention within the deeds that the alley adjacent to the lot(s) not be included in the conveyance of the lot(s).

The City of Del Mar concluded that this exclusionary language served to illegally divide a hypothetical lot which extended to the center line of the alley. (See App. at J-3-4) As a result the City filed on October 30 1990 "Notices of Violation of Illegal Subdivision" (App. at K-1-4), after receiving Respondent's October 26, 1990 "hold harmless" letter (App. at L-1-2). This filing paved the way for Respondents to file on November 20, 1990 a complaint for rescission under Map Act § 66499.32(a) (App. at H-1-15), which Petitioner answered on February 25, 1991 (App. at G-1-10).

The litigation reached the Summary Judgment stage where the Superior Court granted Respondent's motion. The rationale for the granting of the motion was that in 1925 when the roadways were vacated the presumptions

(§§ 831, 1112) served to effectuate a lot larger than that lot depicted on Final Map No. 1285; and that Petitioner had divided this theoretical lot by the usage of the excluding roadway language in the 1988 conveyance deeds (App. at F-1-3).

This holding was affirmed by the Court of Appeal in an unpublished modified opinion (App. at B-27-44). However, the Court of Appeal expanded the rationale proffered by the trial court and concluded that rebuttal of the presumptions can only come from contrary evidence expressed by the original subdivider.

The California Supreme Court, in an unpublished denial, refused to hear the case. (See App. at A-1, B-1-44, C-1-37 and D-1-16).

REASONS FOR GRANTING THE WRIT

Supreme Court rule 10.1(b) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals. This ground for review is present in this case.

Supreme Court Rule 10.1(c) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court. This ground for review is present in this case.

The federal question involved here deals with a Taking of Petitioner's property withqut Due Process of the law. As the Court will see, not only was Petitioner's real property ordered to be given to Respondents but also substantial sums of money. This was done by the unconstitutional application of statutory law which the federal courts have repeatedly condemned as violative of Due Process.

I

PETITIONER WAS DENIED DUE PROCESS AS A RESULT OF AN UNCONSTITUTIONAL APPLICATION OF THE PRESUMPTION(S) AT CALIFORNIA CIVIL CODE § 831 AND § 1112 TO THE CALIFORNIA GOVT. CODE (SUBDIVISION MAP ACT) §§ 66410 ET SEQ

The trial court found at summary judgment that Petitioner had violated the provision of the Subdivision Map Act by expressing in the deed(s) of conveyance (App. at M-2)[2], a contrary intent with regard to the passing of one-half of the vacated roadway portions adjacent to the subject lot(s).

The trial court applied the presumptions in such a way that neither Petitioner, nor anyone else, could exercise his right to retain ownership of his property pursuant to statutory authority (§§ 831 and 1112), without resubdividing property already legally subdivided. The trial court's order states:

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[2] The June 14, 1988 deed conveying lots I and J, Map No. 1285 contained the same "contrary intent" provision as the lot H deed at App. M-1-3.

"While Defendant claims that a contrary intent could be shown to rebut the presumption and was in fact shown by his elimination of the alley from the conveyance to Plaintiffs this does not excuse Defendant from complying with the Subdivision Map Act." (App. at F-3).

A reading of the order illustrates that the alleged Map Act violation was the result of the application of §§ 831 and 1112. By applying the presumptions, the trial court reasoned that the lot depicted on the Final Map should be considered as extending to the center line of the adjacent street/alleys. It was this hypothetical larger lot which was in theory divided by Petitioner when he included the contrary language in the deeds excluding from passage the alley portion. It was the Courts below interpretation by "connecting" the presumptions of the Civil Code, which are recognized almost everywhere as a general rule of construction or as a rebuttable presumption[3], with the provisions of the Subdivision Map Act which resulted in the finding against Petitioner.

The finding was affirmed by the Court of Appeal.

"In 1988, when Smith sold lots H, I, and J he retained the alley portions of the lots. He thus subdivided the lots, creating new units of land by dividing the alley portions from the adjacent lots. . . . ; he (Smith) created new parcels, i.e., the

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[3] Whether the rule upon which the grantee relies is expressed as a presumption or not, the results are much the same. See *Boston Five Cent. Sav. Bank v. Massachusetts General Hospital* 255 Mass. 583 at 585 (1926); 152 N.E. 40; Annotation 49 ALR 2d 987 § 2.

> alley units which he had retained when he sold the lots." (App. at B-37-38).

A reading of the body of the Court of Appeal Opinion shows that the above quote is premised upon the notion that the presumptions of §§ 831 and 1112 served to create a 'lot' extending to the center line of the adjoining street, so that when Petitioner showed a "contrary intent" in his deed, as he must do to prevent passage of the alley portions, he thereby "created new parcels." (App. at B-36-38).

The application of the presumptions to the Subdivision Map Act violates the due process standards established by the federal courts in that the presumptions of §§ 831 and 1112 are not "rationally related" to the Subdivision Map Act. This due process violation is further compounded by the fact that the Court of Appeal applied the presumptions to the actual subdivision of the property as opposed to the grant of the property from Petitioner to Respondent(s). The Appellate Court writes, pursuant to the presumptions:

> "Thus, at the time of the original subdivision lots H, I, and J included half of the adjacent alley." (App. at B-37).

The Court is using the language, "lots H, I, and J included half of the adjacent alley" as a result of that particular language being used by California Courts such as *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, (Cited by the Court at App. B-37), wherein the *Baker* Court states:

> "Thus, when lots 172 through 175 were transferred to appellants, the south half of Bravo Street was *included*. Italics supplied. Id. at 1134

Baker deals with §§ 831 and 1112 in the context of a quiet title action. The Court below has erroneously attached a meaning to the word *include* which is not supportable by case law and which underlies the Due Process claims of Petitioner. The Court below, as the trial court had, utilized the term "include" in much the same way one would utilize the term "merge," i.e., lines of demarcation disappear and alley and lot thereby become one. Therefore, under that scenario one perhaps could envision a division as a result of the excepting out of the alley portions of the "lot." However, that is not what the term "include" means nor is it the way in which the courts utilizing that term in the § 831 and § 1112 cases intended that it be used.

> "*Include* – To have as a component part or parts; imply." *Standard College Dictionary*, Funk & Wagnalls, (1971).

Having a component part is vastly different from having the parts "merge." With component parts the parts are distinguishable which is not the case when a "merging" takes place. Following "merger," everything is indistinguishable.

This is why the cases dealing with and applying the presumptions of §§ 831 and 1112 are not capable of being applied to an analysis under the Subdivision Map Act. Under the Map Act a lot is delineated and identified by number or letter on the Final Map. [California Govt. Code (Map Act) § 66499.52(a).] Within those boundaries is the land intended to be the "lot." The application or non-application of the presumptions of §§ 831 and 1112 will not affect those boundaries although in a proper case the application of the presumptions could result in the

grantee acquiring the fee title in the adjacent street portion resulting in the street portion being *included* along with the conveyance of the lot. The boundaries on the map do not change and it is only those boundaries which we are concerned with when asking if a "lot" under the Subdivision Map Act has been divided in violation of that Act's provisions.

The Courts below failed to grasp this concept and proceeded to apply the presumptions.

In a case dealing specifically with the presumption statutes at §§ 831 and 1112 the Federal Court for the Ninth Circuit has stated:

> "It is clear to the Court that the provisions of Civil Code §§ 1112 and 831, can *only apply* in the case of a *grant* . . . " (Italics supplied by Court). "The Court is of the opinion . . . that the presumptions of the California Codes [§§ 1112, 831] supra, which *apply only in a conveyance* resulting from a grant . . . " *United States v. 5.324 Acres of Land* 79 F.Supp. 748 at 761 (1948). Italics supplied.

In California the rule regarding application of the presumptions is as follows:

> "This code section [1112] establishes a rule of construction sometimes referred to as a presumption, with respect to the effect of a deed conveying property described as bounded by a street. *Application of the rule is limited to a deed containing a description wherein the street as such is used as a boundary.*" Italics supplied. *Speer v. Blasker* 915 Cal.App.2d 155 at 158 (1961); And with regard to section 831 the *Speer* Court writes:

> " . . . under the provisions of section 831 . . . *the intention of the parties to the deed is the determinative factor.*" *Id.*, at 162. Citations omitted.

All of the cases agree that the rule of construction or of so-called presumption, which ordinarily carries title to the roadway's center line, is not conclusive, but yields wherever an intention to the contrary sufficiently appears in the grant. The rule, it has been said, "must be applied in the light of the intention of the parties." *Harris v. Carter* 189 NC 295 at 297; 127 S.E. 1 at 2 (1925). The rule applies when the case is to be decided upon presumption, that is, "in those cases in which the intention of the grantor rests upon presumption." *Joens v. Baumbach* 193 Cal. 567 at 571 (1924). (See generally 49 ALR 2d 994, § 4.)

> "A plan referred to in a deed becomes a part of the contract so far as may be necessary to aid in the identification of the lots and to determine the rights intended to be conveyed. But the presumption is not conclusive. The rule by which the mention of a way as a boundary in a conveyance of land is presumed to mean the middle of the way, if the way belongs to the grantor, is not an absolute rule of law, irrespective of manifest intention, like the rule in Shelley's case, but is merely a principle of interpretation adopted for the purpose of finding out the true meaning of the words used. [Citations]. After reviewing the cases concerning this rule of presumed intent, the court said, in part, the underlying principle on which they all rest is that the intent of the parties in each instance was ascertained from the words used in the written instrument interpreted in light of all the attendant facts. That is the general principle governing the interpretation of deeds." *Suburban Land Co. v. Town of*

Billerica 49 N.E.2d 1012 at 1015 (1943) (S.C. Mass.). Citations omitted.

Federal decisions have also upheld the rule that the presumption only applies to an interpretation of the deed between the parties and the ascertainment of the intention of the parties, particularly that of the grantor.

> " . . . the terms and circumstances of the grant, . . . unless an intention to retain title to the street clearly appears from the conditions of the conveyance." *Faulks v. Schrider* 99 Fed.2d 370 at 372 (1938); "presumptions apply and can only apply in the case of a grant . . . ". *United States v. 5.324 Acres of Land* 79 F.Supp. 748 at 761 (1948); " . . . such title to city lots would not include the land under the adjoining streets." *Federal Crude Oil Co. v. Yount-Lee Oil Co.* 103 F.2d 171, at 174 (1939); "Where land is granted bounding upon a way, public or private, the question whether it extends to the sideline or to the center line of the way, is a question of construction in each particular case, and depends upon the intent of the parties as expressed in the descriptive part of the deed, explained and illustrated by all the other parts . . . " *Banks v. Ogden* 69 U.S. 57 at 68 (Dec. 1864); Vol. 17 L.Ed. 818.

From the foregoing authorities, and from the rule of law as it exists in this country today, the presumption of ownership to the center of the adjoining way is applied only in the factual situation involving the construction of a deed.

In the case at bar, those presumptions (§§ 831 and 1112) were not applied to Petitioner's deed to his grantees nor to any other conveyance. Had they been so applied they would have immediately been dispelled by

the contrary language of the deed(s). (See App. at M-2). Furthermore, the Appeal Court openly acknowledges the presence of the "contrary intent" language by stating:

> "Smith sold the lots by reference to their map numbers on the 1910 Subdivision Map (i.e., "H," "I" and "J") but stated the grant was specifically excluding, however, that portion of the alley adjoining said lot [H, I or J] as closed to public use. Smith desired to retain ownership of the alley." (See App. at B-29-30).

Petitioner did exactly and precisely what a grantor must do to prevent the presumptions from becoming operative and thereby allowing the fee in his roadway adjacent to the lot(s) up to the center line to pass with the conveyance.

Yet it is this act which has provided the basis for the Courts below to declare that the act of expressing a contrary intent is unlawful in that it violates the Subdivision Map Act of California.

> "The general rule is based on the presumed intention of the parties that the grantor would not reserve a long, narrow strip under such a way or stream for which he had no use, and partly on public policy in that such strips are likely to give rise to litigation in the distant future. *But it is not unlawful to retain such a strip.* If the intention to do so is clear, the contrary presumption must yield." *Cities Service Oil Co. v. Dunlap* 100 Fed.2d 294 at 297 (1938). Italics supplied.

It cannot be unlawful to do what the law says you must do in order to avoid having your land pass to another by virtue of the presumption. This is completely

out of harmony with our Constitutional system and Due Process.

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some *rational connection* between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another *shall not be so unreasonable as to be a purely arbitrary mandate." Mobile, Jackson & Kansas City Railroad Company v. Turnipseed, Administrator* 219 U.S. 35 at 43 (1910). Italics supplied.

There is no *"rational relation"* between the presumptions of §§ 831 and 1112 and the Subdivision Map Act of California. To apply those presumptions to a Map Act case similarly lacks a *"rational connection"* and is therefore violative of Due Process.

In *Iran v. Immigration and Naturalization Service* 656 F.2d 469 at 471 (1981) the Federal Court of Appeals for the Ninth Circuit considered the question of illegal entry and the establishment prima facie of alienage and the applicability of the presumption raised by 8 U.S.C. § 1361. The Court stated:

> "The subject of the immigration proceeding then has the burden of proving the time, place and manner of his entry into the United States, and, if this burden is not met, the subject is presumed to be in the United States in violation of law and, therefore, deportable. Since petitioner failed to submit any evidence at the hearing, if this were a case involving illegal entry he would be presumed to be in the United States in violation of the law, and the *INS* would have met its

> burden of proving deportability by clear, unequivocal, and convincing evidence. The presumption raised by section 1361 does not operate, however, in cases like petitioner's, in which the charge is that the alien remained beyond the time authorized, or, more generally, in cases not involving illegal entry." *Id* at page 471.

In cases dealing with §§ 831 and 1112 wherein ownership of the fee in abutting roadways up to the center line is to be determined, the grantee, i.e., owner of the property adjacent to the roadway, establishes a prima facie case by producing a deed showing proof of ownership (§ 831), and/or showing that the deed describes the property conveyed as being bounded by a road (§ 1112).

> "The owner of the village lot is prima facie the owner to the middle of the street." *Banks v. Ogden* 69 U.S. 57 (Dec. 1864); Vol. 17 L.Ed. 818 at 820, citing additional authorities.

The grantor of the property adjacent to the street, whom must also own the street, then has the burden of proving that his intent was for the grantee not to take, by way of the presumption, the fee in his roadway portion when the lot adjacent thereto was conveyed. The most substantial way in which the grantor can do this is by specifically expressing that intention in the deed itself. *Safwenberg v. Marquez* 50 C.A.3d, 301 (1975); *Machado v. Title Guarantee and Trust Co.* 15 Cal.2d 180 (1940); *Speer v. Blasker* 195 Cal.App.2d 155 (1961); *Faulks v. Schrider* 99 F.2d 370 at 372 (1938); *Banks v. Ogden* 69 U.S. 57 at 68 (Dec. 1864), Vol. 17 L.Ed. 818 at 820.

The Courts below have supplanted a *technical* "lot," which is described as having a boundary at the center

line of the adjacent street, into the context of a Subdivision Map Act analysis.

This is the first time in the State of California and this Country that this disingenuous approach has been taken with regard to this issue.

The Court of Appeal held:

> "Under the Civil Code, it is presumed each lot in the Snakewall property which was adjacent to a street or alley extended to the centerline of the street or alley subject to the public's easement to use the streets and alleys. Smith presented no evidence to show the original subdivider had any other intent. Thus, at the time of the original subdivision, lots H, I, J and U included half of the adjacent alley." (App. at B-37).

It is fundamentally unfair as well as legally improper for the Court below to find that Petitioner had to show that a "contrary intent" existed in 1910 on the part of the original subdivider when the original subdivision was recorded.

If the grantees had questioned ownership of the adjacent streets/alleys then they would be relying upon their deeds to trace title.

> "When Plaintiff relies on a paper title alone, he must trace his title (a) to the government, (b) to a grantor in possession at the time of conveyance to Plaintiff, or (c) to a source common to the chains of title of Plaintiff and Defendant." *Ogden's Revised California Real Property Law*, Vol. II, § 27:52, p. 1352, by Arthur G. Bowman, Cont. Ed. of the Bar (1975) citing *Helvey v. Sax* (1951) 38 Cal.2d 21.

Petitioner was their common grantor, therefore, his conveyance to them was as far back as they could look. Aside from the mechanical defects which are glaringly apparent in the rationale proffered by the Courts below, the simple fact remains that neither Petitioner, nor anyone else, could look at a subdivision map and conclude anything other than that the original subdivider intended that the land depicted on the map be acted upon just as it is depicted. In other words, the map speaks for itself. Petitioner submits that pursuant to the Subdivision Map Act of California, if a "lot" depicted on that map is transferred to the grantee per the Map, then it is legally impossible to divide that lot by the conveyance.

A "lot" for purposes of a Subdivision Map Act analysis can only be the "lot(s)" depicted on the Final Subdivision Map. (Gov't. Code § 66499.52(a) defining "lot").

The Courts below treated the presumption more as an independent source of substantive law than as a presumption. A similar situation was found in *Iran v. INS, supra*, 656 F.2d 469 (1981). The Court, commenting upon the Government's application of a presumption to the wrong type of case said:

> "First, there would be no legitimate reason to require proof on the issue of illegal entry in cases not involving that issue. Second, it is apparent that section 1361 was not intended to be an independent source of substantive law. Rather it was intended to create a procedural rule modifying the allocation of proof on the issue of illegal entry. If section 1361 were applied in all deportation cases, it would provide a substantive basis for deportability in

> cases which do not otherwise involve the question of illegal entry. Third, the application of section 1361 in cases in which illegal entry is not an element of the charge of deportability would raise a serious constitutional question. In this circuit, [D]eportation on a charge not presented in the order to show cause, or at the hearing . . . offends due process. [Citations] *Id* at 471.

Section 66499.31 of the California Govt. Code (Map Act) provides that persons guilty of violating the provisions of the Act "shall be punishable by imprisonment in the county jail or in state prison . . . ". No one would dispute that had a criminal complaint been filed it would have been defective for the reasons given in *Iran v. INS*, supra. So too should it be with a civil complaint.

The presumptions of § 831 and § 1112 are rebuttable and as such were intended to create a procedural rule modifying the allocation of proof on the issue of ownership of the adjacent alley or street portions.

Applying the presumptions in other than that way offends Due Process.

II

THE HOLDING OF THE COURT OF APPEAL LEAVES THE PERTINENT SUBDIVISION MAP ACT PROVISIONS UNCONSTITUTIONALLY VAGUE AS APPLIED

The two major provisions at issue herein are § 66424 and § 66499.32 of the Subdivision Map Act.

Section 66424 provides in pertinent part:

> "Subdivision is defined as the division, by any subdivider, of any unit or units of improved or

> unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing . . . "

Petitioner's 4/15/88 and 6/14/88 conveyance of lots H, I and J, Map No. 1285 are reflected as "unit(s)" on the assessor roll. (See App. at I-2-3). The court itself recognizes that the assessment roll "clearly indicates the alleys were separate from the lots." (See App. at B-32-33). The Court then follows that comment with "the assessment roll is not necessarily determinative." (See App. at B-32-33).

Petitioner submits that per the statute (§ 66424) the assessor's roll is the only document which can be utilized in determining whether or not there has been a "subdivision" of property. In fact the Court acknowledges the following:

> "The phrase latest equalized county assessment roll was included in the Subdivision Map Act's definition of subdivision (Govt. C. § 66424) to provide a convenient method of identifying the property being divided and its ownership during a given period of time." (See App. at B-32-33).

Petitioner has submitted repeatedly that the assessment roll reflects lot(s) H, I, and J identified therein as appearing on Final Map No. D01285 at Blk 12. (See App. at I-2-3).

Without need for reference to the cumbersome final map itself, we can see from the Court's Opinion that the boundaries of lot(s) H, I and J are not depicted as extending to the centerline of the adjacent street. The adjacent

alleys are depicted as "separate from the lots." (See App. at B-32-33). More specifically and descriptive however is the Court's recognition that "lots H, I and J *bordered* an alley." (Italics supplied) (See App. at B-29).

Therefore, it is axiomatic that a conveyance of lots H, I and J, Map No. 1285, which have as a boundary the "border of the alley," cannot constitute a "subdivision" of property (§ 66424 Govt. C.) since it is precisely those lots which are identified on the county assessment roll as unit(s).

Even a person with legal training, let alone the average citizen, must query what the status of the county assessment roll is within § 66424 if it is not to be utilized as the document from which we identify and make the determination as to whether or not a "subdivision" of property has occurred. This uncertainty leaves the application of the statute to the facts and circumstances of this case unconstitutionally vague.

Similarly Govt. Code (Map Act) § 66499.32 is unconstitutionally vague as applied. Respondents filed their complaint for "rescission" pursuant to Govt. Code § 66499.32(a) (App. at H-7-8), which states:

> CONVEYANCE VOIDABLE BY GRANTEE
>
> "(a) Any deed of conveyance, sale or contract to sell real property which has been divided, or which has resulted from a division, in violation of the provisions of this division, or of the provisions of local ordinances enacted pursuant to this division, is voidable at the sole option of the grantee, . . . "

However, § 66499.32 also contains an exempting provision found at next to the last paragraph which states:

> "The provisions of this section shall not apply to the conveyance of any parcel of real property identified . . . *in a recorded final map* or parcel map, from and after the date of recording." Italics supplied.

The appeals court interpretation and subsequent application to Petitioner of the provision is wholly lacking in understanding. The linchpin for the Court's holding that the exempting provision does not apply to this case is found in the Court's following finding:

> "Smith did not sell the same lots as those depicted on the subdivision map." (See App. at B-42).

This statement creates the unconstitutional vagueness not only with respect to the case at bar but for anyone selling property identified in a recorded Final Map. This encompasses millions of people who own property conveyed to them described by reference to a recorded Final Map.

Perhaps the solution, and a very simple one, is to have the Courts and the Bar agree on the definition of "depict."

> "Depict – To portray or represent by or as by drawing." *Standard College Dictionary*, Funk & Wagnalls, (1971).

Petitioner would submit that this is an acceptable definition and one readily adaptable to these facts. It is the Court's own reasoning which vividly demonstrates

how unclear the application of the statute is and will continue to be.

Within the Court's own recitation of the facts we see the following.

> "Lots H, I and J bordered an alley. The subdivision is depicted in a series of maps showing the various lots and a number of streets and alleys bisecting the subdivision and lying *adjacent* to the various lots. The subdivision maps . . . contain . . . a graphic representation and numerical measurements of the lots and their locations." (See App. at B-29).

> "In 1988, Smith sold lot 'H' to Scott and Robin Emsley and sold lots 'I' and 'J' to Robin Emsley's mother Margaret Roulette. *Smith sold the lots by reference to their map numbers on the 1910 subdivision map* (i.e., 'H,' 'I,' and 'J') but stated the grant was [s]pecifically excluding, however, that portion of the alley adjoining said lot (H, I or J) as closed to public use. Smith desired to retain ownership of the alley." Italics supplied. (See App. at B-29-30).

and finally,

> "First, we note the assessment roll does not contradict the Subdivision Map Act by *clearly indicating the alleys were separate from the lots.*" Italics supplied. (See App. at B-32-33).

There are other places within the opinion where the Court below recognizes that the streets and alleys are clearly shown as being separately demarcated from the lot(s). We know "Smith sold the lots by reference to their map numbers on the 1910 subdivision map." (See App. at B-29).

The Trial Court at summary judgment noted for the record while viewing the Final Map No. 1285 depicting lots H, I and J that the boundaries of the lots showed them as being bordered by the edge of the adjacent street.

> "The Court: I won't judicially notice it, but I will indicate for the record that on this drawing there are existent alley ways which do not show a lot line to the center of the alley way." (See App. at E-12).

The Court below says that if you sell property by reference to a subdivision map and number identifying that particular property on the map then you "will not sell the same lots as those depicted on the subdivision map." (See App. B-42). This is unconstitutionally vague in application; and contradicts Map Act § 66499.57 which mandates that such description shall be "lawful and sufficient."

The Court views the exclusion of the alley portion as somehow removing or slicing off a portion of the lot depicted on the map. Petitioner submits that this is a very real impossibility not only from a legal standpoint but from a physical standpoint as well.

Regardless of the disposition of the alley, which the Court below has acknowledged is separately demarcated from the adjacent lots, when one sells property and references a map which *depicts* that property and its boundaries, then at a minimum the buyer will receive the land so depicted.

Whether the buyer also takes the additional fee title in the *adjacent* street area pursuant to the presumptions is of no consequence to the applicability of the exempting

provision. The buyer is sold a parcel of property "identified in a recorded final map" therefore, the seller is exempt from the provisions of Map Act § 66499.32. The Court below should have so held.

The Court's holding and resultant application to Petitioner does not lend itself to an understanding graspable by even a trained legal scholar. Consequently, the statute is unconstitutionally applied or rather its failure to be enforced by the Court is unconstitutional on vagueness grounds.

Statutory construction in the Federal system and in California begins with the fundamental rule that a court "should ascertain the intent of the legislature so as to effectuate the purpose of the law." *In Re Marriage of Siller* 187 Cal.App.3d 36 at 43 (1986); *U.S. v. Jerge* 738 F.Supp. 181 at 183 (1990).

> "If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." *California Teachers Assn. v. San Diego Community College Dist.* 28 Cal3d 692 at 698 (1981).

The same applies to federal statutes. In construing statutes, the Supreme Court begins with language of the statute and asks whether Congress has spoken on the subject. If the intent of Congress is clear, that is the end of the matter, for the Court must give effect to the unambiguously expressed intent of Congress, *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n.* 111 S.Ct. 1156 at 1163 (1991).

Both of the statutes herein addressed (Calif. Govt. Code § 66499.32 and § 66424) are as clear in what they mean as any statute can be. Yet, the holding of the Court below creates a vagueness which will not cut constitutional muster under the Due Process Clause. § 66424 states precisely and explicitly what a "subdivision" is; and similarly, § 66499.32, next to the last paragraph, states precisely that one who conveys property identified on a recorded final map is exempt from the provisions of § 66499.32. Where a statute states what a term means, all other meanings not stated are excluded. *Johns-Manville Corp. v. U.S.* 855 F.2d 1556 at 1559 (1988).

III

THE TRIAL COURT WAS WITHOUT POWER IN THE SUMMARY JUDGMENT MOTION TO RESOLVE THE ISSUE OF WHETHER OR NOT THE PRESUMPTIONS WERE CONTROVERTED; AND BY DOING SO THE COURT DENIED PETITIONER A TRIAL ON THE MERITS

Petitioner has contended from the outset that Civil Code §§ 831 and 1112 do not apply to this case for the primary reason that there is no dispute or controversy regarding ownership of the alleys/street adjacent to lot(s) H, I and J. There must be a dispute or controversy in order for a court to be involved in the adjudicative process. Nevertheless, even if we were to concede for sake of argument that the presumptions could be applied, then by interjecting them into this litigation as a basis for the finding that there was an illegal subdivision, the Trial Court was precluded from granting a summary judgment based upon an analysis of whether those presumptions

were controverted or not because that is clearly a question of fact which is material and genuine.

Sections 831 and 1112 of the California Civil Code enacted in 1872 are rebuttable presumption statutes. They provide as follows:

> § 831. BOUNDARIES BY WAYS
>
> "An owner of land bounded by a road or street is presumed to own to the center of the way, *but the contrary may be shown.*" Italics supplied.
>
> § 1112. TRANSFER OF LAND BOUNDED BY A HIGHWAY
>
> "A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, *unless a different intent appears from the grant.*" Italics supplied. [See *City of Redlands v. Nickerson* 188 Cal.App.2d 118 at 125 (1961); and *Pinsky v. Sloat* 130 Cal.App.2d 579 (1955) holding that §§ 831 and 1112 are rebuttable presumptions.]

Under both California and Federal law, presumptions are assumptions of fact that the law requires to be made from another fact or group of facts established in the action and imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption. (California Evidence Code § 600(a); Federal Rules of Evidence § 301.)

Since a presumption is an "assumption of fact" it therefore stands to reason that with regard to a rebuttable or disputable presumption, whether it has been controverted is a question of fact.

> "In most jurisdictions, the presumption imposes on the party against whom it operates the burden of going forward with the evidence, but disappears and has no probative force when that party has introduced rebutting evidence to make a question for the jury on the facts involved." *9A Am. Jur. Pl. and Pr. Forms (Rev), Evidence,* p 84, Presumptions.

Additionally, the federal jury instruction regarding the effect of uncontroverted disputable presumptions reads as follows:

> "You are instructed that a presumption is a deduction which the law expressly directs to be made from particular facts. A disputable presumption may be controverted by other evidence, direct or indirect, but unless so controverted members of the jury are bound to find according to the presumption." (Form 52, p 85, Id.)

Whether a presumption is controverted is a question of fact for the trier of fact. (31 Cal.Jur.3d § 110, p 146.)

> "Against a proved fact, or a fact admitted, a disputable presumption has no weight, but where it is undertaken to prove the fact against the presumption, it still remains with the jury to say whether or not the fact has been proven; . . . " *People v. Milner* 122 Cal. 171, 179 (1898).

Additionally, both California and Federal law preclude the disposal of an action by summary judgment if the fact issues include an issue respecting the intention of the parties to an agreement. *Walsh v. Walsh* 18 C.2d 439 at 443-444 (1941):

> "Issues involving intent or state of mind usually are inappropriate for summary judgment. . . . Questions of state of mind and reasonableness are not usually determined upon summary judgment motions even when the underlying facts are not in dispute . . . This is true even if the same facts eventually will be presented to the court as the trier of fact." (See generally, *West's Federal Practice Manual*, (Rev. 2d Ed), Vol. 7, § 9253, p 559 where numerous authorities for the above proposition are listed).

That §§ 831 and 1112 involve the uppermost concern of the intention of the parties is undisputed. *Speer v. Blasker*, supra, 915 Cal.App.2d 155 at 162 (1961); *Harris v. Carter*, supra, 189 NC 295 at 297; 127 S.E. 1, 2 (1925); *Joens v. Baumbach*, supra, 193 Cal. 567 at 571 (1924); *Suburban Land Co. v. Town of Billerica*, supra, 49 N.E. 2d 1012 at 1015 (1943) (S.C. Mass.); *Faulks v. Schrider*, supra, 99 Fed.2d 370 at 372 (1938); *Banks v. Ogden*, supra, 69 U.S. 57 at 68 (Dec. 1864).

Petitioner was entitled to have his and Respondents' intentions explored by the trier of fact. Due Process requires no less.

Whether or not Petitioner rebutted the presumptions of §§ 831 and 1112 of the California Civil Code was not a determination to be made by the trial court in a motion for summary judgment. By declaring that the presumptions were not rebutted, Petitioner was denied a trial wherein the facts and circumstances could be weighed and assessed in light of the presumptions.

In the instant case both the Trial Court and Appellate Court below found that the presumptions of §§ 831 and

1112 served to create a lot which had a boundary line at the center line of the adjoining street. Impliedly and specifically both courts found that Petitioner had not rebutted the presumptions. The Appellate Court held:

> "Smith presented no evidence to show the original subdivider had any other intent. Thus, at the time of the original subdivision, lots H, I, and J included half of the adjacent alley." (App. at B-37).

By this holding, which in large part mirrors the trial court in that the trial court opinion was affirmed, both courts are deciding the quantum of proof and what type of proof was necessary in order for the presumptions to be rebutted. This is not the function of the Trial Court in a summary judgment situation nor is it the function of the Appellate Court. Summary judgment is not the occasion to resolve this question.

In California the rule regarding summary judgments is that if an issue of fact is presented, the court may not proceed further, but must permit trial thereof [*Hardy v. Hardy* 23 C2d 244 at 246 (1943)]. Furthermore, at a summary judgment the court is without power to make findings of fact. [*Weichman v. Vetri* 100 CA2d 177 at 180 (1950)].

> "The court does not resolve, conflicting factual allegations, for the purpose of the procedure is to discover whether the parties have evidence requiring assessment at trial. The office of a motion for summary judgment is merely to ferret out fact issues, *not to resolve them.*" (Italics supplied) *R.D. Reeder Lathing Co. v. Allen* 66 C.2d 317 at 376 and 380 (1967). *Rooney v. Vermont Invest. Corp.* 10 Cal.3d 351 at 372 (1973).

Clearly, both the Trial and Appellate Court resolved the issue of whether or not the presumptions of §§ 831 and 1112 had been rebutted. Since those holdings resulted in Petitioner being ordered to give up his property, he was told to do so without being afforded the trial he was entitled to.

As a result of the fact that this case is founded upon the application of the rebuttable presumptions in §§ 831 and 1112, then the question of whether or not they were controverted necessarily precludes the granting of a summary judgment. The rationale that the presumptions were not rebutted will not serve the Trial nor the Appellate Court as grounds for finding against Petitioner at the summary judgment stage of the proceedings. Consequently, allowance of the Opinion to stand would be an egregious taking of property without Due Process of the law.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted. **Alternatively**, the issues of law presented herein, when viewed in the light of the holding of the Court below may well convince the Court to summarily reverse the Court below and remand the case with appropriate instructions.

Respectfully submitted,

JAMES E. SMITH
Propria Persona

Dated: September 24, 1993

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APPENDIX A

Fourth Appellate District,
Division One, No. D017058
S033948

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

MARGARET L. ROULETTE Et Al.,
Respondents

v.

JAMES E. SMITH, Appellant

Supreme Court
(Filed
Aug. 25, 1993)

Appellant's petition for review DENIED.

/s/ Lucas
Chief Justice

APPENDIX B

CIVIL NO. S 033948

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Roulette, The Emsley's, et al Plaintiffs and Respondents, vs. James E. Smith, Defendant and Appellant. (See complete title page at page v)	CIVIL NO. S 033948 (4th DCA, Div. One D017058) (No. Co. Sup. Ct. N49451) (Filed July 19, 1993)

PETITION FOR REVIEW

On Appeal From The Judgment of the Superior Court
of the State of California, San Diego County
Honorables Ronald L. Johnson and William J. Howatt, Jr.

James E. Smith
2100 Gatun Street
Del Mar, California 92014
Phone 619-755-7794
Propria Persona for Appellant

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ISSUE A: Does the conveyance of a legally subdivided lot(s), [described by; " . . . a reference sufficient for the identification of the map being coupled with the description", (Gov't Code § 66499.57)], which manifests in the conveyance documents an intent by the grantor to retain his fee ownership of adjacent vacated street/alleys, (as allowed by Civil Code §§ 831 and 1112), create illegally subdivided lot(s)? 1

ISSUE B: Does next to the last paragraph of Govt. Code § 66499.32, (which states; "the provisions of this section shall not apply to the conveyance of any parcel of real property . . . identified in a recorded final map or parcel map, from and after the date of recording"), apply when the conveyances refer to the recorded final map and manifests an intent within the conveyance documents that the grantor will retain his fee ownership of adjacent vacated street/alleys as allowed for in Civil Code §§ 831 or 1112? ..... 1 – 2

ISSUE C: Does the court's below "first impression" Opinion which alters the lot lines depicted for lots H, I and J on Map No. 1285, (without compliance with Govt. Code §§ 66499.21 through 66499.29), violate the "Separation of Powers Doctrine" at B. and P. Code § 10249 et seq and § 11000 et seq and consequently lack jurisdiction? 2

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Roulette, et al. v. Smith, Case Nos. S___; 4th DCA, Div. One D017058; N.Co.S.Ct. No. N49451.

PROOF OF FILING (PRIORITY MAIL) AND SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, self-employed in the County of San Diego, State of California, in which County the within mentioned mailing occurred, and not a party to the subject matter. My business address is 993-F Lomas Santa Fe Drive, Solana Beach, California 92075. I filed (priority mail) and served the within: PETITION FOR REVIEW (a true and correct copy of which is attached) by United States mail addressed as follows:

California Supreme Court
South Tower-Eighth Floor
303 Second Street
San Francisco, CA 94107

(Original plus 13 copies)

Clerk of the Superior Court
North County Branch - Dept. M
325 So. Melrose Drive
Vista, CA 92083
(1 copy)

Mark A. Potter, Esq.
Attorney at Law
5090 Shoreham Place, Suite 101
San Diego, CA 92122-5934
For Respondent City (1 copy)

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Scalone, et al., Esqs. Attorneys at Law
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La Jolla, CA 92037
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Gerald L. Gorman, Esq.
Gorman and Noorigian, Esqs.
Attorneys at Law
450 B Street, Suite 860
San Diego, CA 92101-8003
For Respondents Roulette, et al (1 copy)

Clerk of the 4th DCA
Court of Appeal-Division One
Fourth Appellate District
750 "B" Street, Suite 500
San Diego, CA 92101
(1 copy)

The documents were then placed in envelopes, which were sealed, and with the postage thereon fully prepaid and deposited with the United States Postal Service for mailing by me on July 16, 1993 at Solana Beach, California, following ordinary business practices.

There is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 16, 1993 in San Diego, California.

/s/ Barbara L. Dennis
Barbara L. Dennis

James E. Smith, Propria Persona
2100 Gatun Street
Del Mar, CA 92014
(619) 755-7794

For Petitioner, Appellant, Defendant
and Cross-Complainant James E. Smith

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Respondents/Plaintiffs/ Appellees, v. JAMES E. SMITH; and DOES 1 through 20, inclusive, Petitioner/Defendant/ Appellant,	CASE NO. S 033948 (4TH DCA, Div. One D017058) (No. Co. Sup.Ct. N49451)
JAMES E. SMITH, Petitioner/Cross-Complainant/ Appellant, v. MARGARET L. ROULETTE, individually; MARGARET L. ROULETTE as trustee of Trust "B" under that certain Declaration of Trust dated November 29, 1971; S. SCOTT EMSLEY, individually; S. SCOTT EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; ROBIN S. EMSLEY, individually; ROBIN S. EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; CITY OF DEL MAR; CITY COUNCIL OF DEL MAR; and ROES 1 through 50, inclusive. Respondents/Cross-Defendants/Appellees.	

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CIVIL NO. S033948

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Roulette, The Emsley's, et al, Plaintiffs and Respondents, vs. James E. Smith, Defendant and Appellant.	CIVIL NO. S___ (4TH DCA, Div. One D017058) (No. Co. Sup. Ct. N49451)

PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court
of the State of California, San Diego County
Honorables Ronald L. Johnson and
William J. Howatt, Jr.

to the Honorable Malcolm Lucas, Chief Justice of California and to the Honorable Associate Justices of the Supreme Court of California:

STATEMENT OF "FIRST IMPRESSION" ISSUES PRESENTED FOR REVIEW

ISSUE A: Does the conveyance of a legally subdivided lot(s), [described by; " . . . a reference sufficient for the identification of the map being coupled with the description", (Gov't. Code § 66499.57)], which manifests in the conveyance documents an intent by the grantor to retain his fee ownership of adjacent vacated street/alleys, (as allowed by Civil Code §§ 831 and 1112), create illegally subdivided lot(s)?

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section shall not apply to the conveyance of any parcel of real property . . . identified in a recorded final map or parcel map, from and after the date of recording"), apply when the conveyances refer to the recorded final map and manifests an intent within the conveyance documents that the grantor will retain his fee ownership of adjacent vacated street/alleys as allowed for in Civil Code §§ 831 or 1112?

ISSUE C: Does the court's below "first impression" Opinion which alters the lot lines depicted for lots H, I and J on Map No. 1285, (without compliance with Govt. Code §§ 66499.21 through 66499.29), violate the "Separation of Powers Doctrine" at B. and P. Code § 10249 et seq and § 11000 et seq and consequently lack jurisdiction?

PROCEDURAL STATEMENT

James E. Smith, Appellant, hereby petitions for review of the Opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One filed in this action on June 9, 1993, affirming the judgment of the trial court in favor of Respondent. A copy of the Opinion is attached hereto as Appendix "A", OP, pp 1-17.

The Opinion was modified by Order on July 1, 1993 after Petitioner filed on June 22, 1993 his "Petition for Rehearing". A copy of the "Order Modifying Opinion" showing the date of its filing, i.e. 7/1/93, is set forth herein at page 18 of Appendix "A".

Pending Case Nos. D017742 and D018419 involve similar issues as those herein.

The Petition for Review Denied on May 12, 1993 fo
Case No. S032104/D011536, involving the Snakewall (20
lots, "Petition for a Writ of Certiorari to the Supreme
Court of the State of California" is due in the United
States Supreme Court on or before August 10, 1993 and
Appellant plans a timely filing. The Appendix to said
"Petition for a Writ . . . " is now in the printing process a
the printer and should be in Appellant's possession thi
week.

The Petition for Review Denied on June 9, 1993 fo
Case No. S033083/D015814 involving lots H, I and J, Map
No. 1285, (i.e. this Case No. D017058 and No. D018419)
and lot U, Map No. 1343, (i.e. Case No. D017742), "Peti
tion for a Writ of Certiorari to the Supreme Court of the
State of California" is due in the United States Supreme
Court on or before September 7, 1993 and appellant plans
a timely filing.

Also Pending is Case No. D015917 involving a ful
"Environmental Impact Report" for lot T, Map No. 134
and Del Mar's required "(20) foot access easement" fo
lots G, H, I, J and S, Map No. 1285, lot T, Map No. 134
and lots 780 and 785, Map No. 1592.

In each Case Nos. D015814, D015917, D017058
D017742 and D018419 the lower courts granted judicia
notice of the other then pending Case Nos. herein stated
as well as Case No. S032104/D011536. At oral argumen
on February 9, 1993 of Case No. D011536 judicial notice
of subsequently filed Case's herein stated was requested
by Appellant. At oral argument on April 13, 1993 of Case
No. D015814 judicial notice of subsequently filed Case's
herein stated was requested by Appellant.

GROUNDS FOR REVIEW

Review by this Court is necessary on the grounds that the decisions of the trial court and the Court of Appeal are "first impression"; and violate the "Separation of Powers Doctrine" and consequently lack jurisdiction; and not in conformity with existing statutory and case law in California. This court's ruling is necessary to secure uniformity of decision and settlement of important questions of law.

This case is one of "first impression" in this State as well as Nationally, *Earl v. Dutour* (1919) 6 A.L.R. 1163, and the courts below "lack jurisdiction". Never has a 'lot', as that term is used in the context of a Civil Code §§ 831 or 1112 analysis, been used in a Subdivision Map Act case. The presumptions embodied within § 831 and § 1112 dealing with ownership of the fee in one-half of the adjacent street portions next to a lot is recognized Nationally. Furthermore, most if not all property in California, and the United States is subject to some form of subdivision law.

The Appellate Court should have ordered that their Opinion be published. In viewing the standards for publication set forth in Cal. Rules of Ct. 976(b) it is clear this case and the Opinion meet the criteria of establishing a new rule of law. The Opinion has created a conflict between the Subdivision Map Act and the Civil Code [§§ 831, 1112], and this issue is clearly of a continuing public interest so long as property adjacent to streets and highways is sold.

Seemingly, the Court of Appeal feels that the solution to the present case is an obvious one. That being the case,

this Court has even more reason to desire a review because of the potential for misleading information to be presented to the bench and bar.

With regard to Appellant there is pending Case No. D017742 involving essentially the same question concerning lot U, Map No. 1343. On November 5, 1990 the City of Del Mar gave final approval for the proposed lot U, Map No. 1343 dwelling (See Fn 1, "Petition for Rehearing", 1st ¶ , pp 8-9). The California Coastal Commission on February 5, 1991 gave final approval for the proposed lot U, Map No. 1343 dwelling (See Fn 1, "Petition for Rehearing", 1st ¶ , pp 8-9). Furthermore, Appellant has sold other lots adjacent to vacated street/alleys utilizing the same language.

Review is necessary so that property owners in California will have guidance when selling property adjacent to a vacated street/alley.

The current status of the law with regard to this issue as opined by the Court of Appeal herein is such that a state of non-remedial flux is created.

If the lot seller wishes to sell lot(s) adjacent to his fee owned vacated roadway and retain ownership of that roadway, as he is entitled by law to do, he must express that desire in the sales documents and/or conveyance (Civil Code §§ 831 or 1112). However, by doing so, the Court of Appeal is of the opinion that he runs afoul of the Subdivision Map Act because of the creation of an illegal subdivision per Govt. Code §66424.

Surely a property owner manifesting a 'contrary intent' within the deed of conveyance and sales documents, as he must in order to rebut the presumptions of Civil Code §§ 831 or 1112, cannot be expected to apply for a new subdivision whenever he wants to sell his lot(s) exactly as they were legally subdivided. But, what is he supposed to do?

This Court should grant review of this case so that lot owners in California selling lot(s) adjacent to a vacated roadway will know what to do and will thereby avoid being ensnared in litigation as Appellant has been and is.

If this Court believes that the Opinion of the Court of Appeal is correct, then based upon the criteria at Cal. Rules of Ct. 976(b) this Court should order the opinion published.

STATEMENT OF CASE FACTS (OP, PP 2-5)

Appellant purchased approximately (20) acres of subdivided property in the City of Del Mar, California in 1977. The (20) lots, known as the Snakewall Property, had been originally subdivided in 1910, 1911 and 1913 by Final Map Nos. 1285, 1343 and 1592 and included streets and alleys in addition to more than (100) lots.

The lots at issue in this case are lots H, I and J, Map No. 1285. These lots are bordered by streets and alleys which were at the time of the original subdivision in 1910 dedicated to the County of San Diego, In 1925, however, some street and alleys bordering the lots were vacated by the County.

In 1988 Appellant sold Respondents lots H, I, and J, Map No. 1285.

Within the conveyance deeds, the description of the lot(s) being sold was made by identification of the lot(s) letter on Final Map No. 1285.

In addition to that description, Appellant also added the following language to the deed; "[s]pecifically excluding, however, that portion of the alley adjoining said lot [H, I or J] as closed to public use."

Respondents contend that it was precisely this additional language "specifically excluding, however, that portion . . . " which effectuated an illegal subdivision of a lot.

The City of Del Mar on October 14, 1993 recorded a "Notice of Violation of Illegal Subdivision" upon lots H, I and J, Map No. 1285 in total contravention of the conclusive presumptions at Govt. Code § 66412.6(a)(b); and without notice to Appellant the street/alleys fee owner; and without a Noticed public hearing; and after Respondents provided the City a "hold harmless" letter; thereby paving the way for Respondents action for recission [sic] under Govt. Code § 66499.32(a).

Relying exclusively upon the theory that Civil Code §§ 831 and 1112 effectuated an augmentation of the lots depicted on Final Map No. 1285 by a distance up to the centerline of the adjoining street; The City of Del Mar and Respondents reasoned that the inclusion in the deed of the language "specifically excluding, however, that portion . . . ", had the effect of dividing this hypothetical lot

which extended to the center line of the street although not so depicted on Final Map No. 1285.

Both courts below agreed with the City of Del Mar and Respondents theory. The trial court opined that Civil Code §§ 831 and 1112 applied in 1925 upon vacation of the streets/alleys. The Court of Appeal opined that Civil Code §§ 831 and 1112 applied in 1910 when Final Map No. 1285 was recorded.

Appellant's position is the presumption of Civil Code §§ 831 and 1112 concerning his fee street/alleys ownership was rebutted by his expression of "specifically excluding, however, that portion . . . ", (i.e. "contrary intent"), in the conveyance deeds and sales documents.

BRIEF IN SUPPORT OF PETITION FOR REVIEW

POINT 1

GOVT. CODE § 66499.57 MANDATES THAT THE DESCRIPTION USED IN THE CONVEYANCES, [TO WIT; LOTS H, I AND J, MAP NO. 1285 (OP, p 2)], *SHALL BE* LAWFUL AND SUFFICIENT

The Subdivision Map Act mandates that when an owner of a prior legally subdivided lot(s) sells that lot(s) and describes it as being designated on an identified Official Final Map "the conveyance shall be lawful and sufficient". [Govt. Code, (Map Act), § 66499.57].

Appellant's conveyance described the lot(s) by letter as identified on the Final Subdivision Map, to wit; lot(s) H, I or J, Map No. 1285 (OP, p 2).

The Court of Appeal OP, pp 10 and 11 has determined that Civil Code §§ 831 and 1112 dealing with the

presumption of ownership to the center line of the adjacent vacated street/alleys supersedes Map Act § 66499.57 contrary to C.C.P. 2077(6). This Court needs to correct the lower courts erroneous "first impression" and "lack of jurisdiction" Opinion.

Section 831 of the Civil Code provides as follows:

'Land Bordering Road or Street,

"An owner of land bounded by a road or street is presumed to own to the center of the way, *but the contrary may be shown.*" Emphasis added.

Section 1112 of the Civil Code provides:

'Grants Bordering Highways'

"A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, *unless a different intent appears from the grant.*" Emphasis added.

These two statutes are rebuttable presumption statutes. *Anderson v. Citizens Sav. and Trust Co.* (1921) 185 Cal. 386, 396, 397; *Earl v. Dutour* (1919) 181 Cal. 58, 61; *Moody v. Palmer* (1875) 50 Cal. 31, 34; *City of Redlands v. Nickerson* (1961) 188 C.A. 2d 118, 125; *Murray v. Title Ins. and Trust Co.* (1967) 250 C.A. 2d 248, 256; *Speer v. Blasker* (1961) 195 C.A. 2d 155, 162.

The conveyances in question were specifically lots H, I and J, Map No. 1285 (OP, p 2). These lots were part of Final Map No. 1285 which included numerous other lots, (i.e. approximately 50 lots), streets and alleys.

The courts below apparently not understanding the mechanics of presumptions, [much less conclusive presumptions (Govt. Code § 66412.6(a)(b)], and how they operate as rules of construction, (Evid. Code § 600(a); *Speer v. Blasker* (1961) 195 C.A. 2d 155, 158), believed that the effect of the presumptions, outside of an 'action', was to increase the size of the lots which are depicted on Final Subdivision Map No. 1285 by a distance up to the center line of the adjoining alleys/street. The Court opines as follows:

> "Under the Civil Code [§§ 831, 1112] it is presumed each lot in the Snakewall property which was adjacent to a street or alley extended to the center line of the street or alley subject to the public's easement . . . thus, at the time of the original subdivision, lots H, I and J included half of the adjacent alley." OP, p 10 and 11.

In support thereof the Court cites as authority, inter alia, *Baker v. Ramirez* (1987) 190 Cal. App. 3d 1123, 1132 (OP p 10). From the Baker decision we see language found in all § 831 or § 1112 cases and which is the basis for the Court's confusion in this case.

> "The north half of Bravo Street became part of lots 168 through 171, and the south half became part of lots 172 through 175 . . . Since at the *time of conveyance* John Maddock owned and enjoyed the right to possession of Bravo Street which adjoined the north line of said lots, the presumption of Civil Code section 1112 applied to make the center line of Bravo street the north line of said lots." *Baker*, at 1132. Emphasis added.

First, the above language illustrates the conveyance time is when § 1112 is applied. Unlike Appellant John Maddock did not rebut the § 1112 presumption by expressing in the conveyance deed and sales documents *his intent not to pass title* to the vacated street/alleys.

Second, it is language found in *Baker* and numerous other cases dealing with sections 831 and 1112 which causes the Court to believe that the 'lot' *really* extends to the center line of the adjacent alley (OP p 10). For purposes of interpretation of §§ 831 and 1112, Appellant submits that in Baker and other cases, which lack evidence of any 'contrary intent' by the grantor or a common grantor such as John Maddock, the presumptions of §§ 831 and 1112 will serve to vest fee title in the adjacent street portion in the grantee of the lot adjacent thereto. However, referring to the center line of the street as being the new boundary line of the 'lot' is strictly for purposes of visually imaging the increased fee ownership. No Map depicts the 'new boundary'.

This Court held the following in *Earl v. Dutour* (1919) 181 Cal. 58 with regard to the 'new boundary' concept proposed by the Appellate Court:

> "However clearly it may appear that the owner of a lot holds title to the center of an adjoining street, subject to the public easement, and that the boundary of the lot is *technically* therefore, the center of the street, in view of the fact that the owner of such lot or land has no right to the possession or occupancy of any portion of such public street, we are of the opinion that the word 'lot', as generally and customarily used,

> does not include such portion of the street [citation]. As stated by the Supreme Court of Indiana, "lot and street are two separate and distinct terms, and have separate and distinct meanings. The term 'lots', in its common and ordinary meaning, includes that portion of the platted territory measured and set apart for individual and private use and occupancy. While the term 'streets' means that portion set apart and designated for the use of the public . . . ". Id. at 60. Emphasis added.

There are two critical points to be made with regard to the preceding quote. One is that the 'new boundary', so to speak, at the center line of the adjacent street is only 'technically' there. In both legal and everyday parlance, usage of the word 'technically' implies an interpretation of something;

> 'Technical' – according to or determined by law or by a legal interpretation.' *Standard College Dictionary,* Funk & Wagnalls (1971)

It was this 'technical' boundary which served to support the Appellate Court opinion in *Baker v. Ramirez* (1987) 190 Cal. App. 3d 1123.

> "Since at the time of the conveyance John Maddock owned and enjoyed the right to possession of Bravo Street which adjoined the north line of said lots, the presumption of Civil Code Section 1112 applied to make the center line of Bravo Street the north line of said lots. Civ. Code § 1112; cf. *Earl v. Dutour* (1919) 181 Cal. 58, 60 [183 p 438, 6 A.L.R. 1163]".

The Appellate Court in the instant case primarily relied upon *Baker* in support of its holding that the 'lot'

extended to the center line of the adjacent street (OP p 10); and it is this 'lot' relied upon by the court below which is at the heart of the alleged 'iilegal subdivision of a lot' claim.

This brings us to the crux of the issue at hand. Is that lot with the so-called 'new boundary' a lot susceptible to the strictures of the Subdivision Map Act? *The answer is No.*

The following will illustrate why. The *Baker* court found that "the subdivision map shows the north line to be the south edge of Bravo Street." In other words, the map depicts lots 168 through 171 as being bordered by Bravo Street, logically therefore, the lot lines *are not depicted* as extending to the center line of the street. When contending that the 'new boundary' is the center line of the street, one is required to visualize the 'new boundary' because it is not depicted; and will not be depicted absent the recordation of a new Subdivision Map at the County Recorder's Office.

Similarly, in the case at bar Appellant referred the Appellate Court to the Trial Court's finding which was as follows:

> "The Court: I won't judicially notice it, but I will indicate for the record that on this drawing, [Final Map #1285], there are existent alleyways which do not show a lot line to the center of the alley way." (RT Vol. IX, p 409, LL 27-28 and p 410, LL 1-11; "Pet. for Rehearing", p 4).

Just as in *Baker,* Final Subdivision Map No. 1285 depicts lots H, I, and J bounded by the adjacent street/

alleys and depicts them as not extending to the centerline.

From the brief analysis above one can see the Court in *Baker* is impliedly, if not directly, recognizing the existence of a Final Map lot and a §§ 831 or 1112 lot. One type of lot is depicted as bordered by a street/alley on the Final Subdivision Map and the other as extending, pursuant to the presumptions at §§ 831 or 1112 to the centerline of the adjacent street/alley.

Indeed, the Appellate Court found as follows:

> "First, we note the assessment roll does not contradict the Subdivision Map Act by clearly indicating the alleys were separate from the lots." (OP p 6, Fn 3.)

Here we see that Final Subdivision Map No. 1285, as recognized by the Appellate Court, depicts lots H, I, and J as being bordered by a street/alleys. Therefore, when the Appellate Court states:

> "it is presumed each lot . . . adjacent to a street or alley extends to the center line . . . " (OP, p 10);

the court clearly is referring to a 'lot' which has different dimensions than the one which is depicted on Final Map No. 1285.

It is this §§ 831 or 1112 lot which has served as the basis for the alleged illegal subdivision of lots H, I and J, Map No. 1285.

It is Petitioner's contention that lots H, I and J as depicted on Final Map No. 1285 are the only lots which can be subject to the strictures of the Subdivision Map

Act. Support for this contention can be found at several sections of the Subdivision Map Act.

Government Code § 66499.52(a) states:

> "(a) Whenever any city, town or subdivision of land is platted or divided into lots or blocks, and whenever any addition to any city, town or subdivision is laid out into lots or blocks for the purpose of sale or transfer, *the city engineer or the county surveyor* under the direction and with the approval of the city council or board of supervisors, may make an official map of the city, town or subdivision giving to each block on the map a number, and to each lot . . . a separate number or letter and giving names to the streets . . . as may be delineated on the official Map." Emphasis added.

This Govt. Code § 66499.52(a) along with §§ 66412.6(a)(b), 66434(d), 66499.32 next to the last paragraph, 66499.35(d)(e), 66499.52(b), which is also referenced at 66499.35(e), and 66499.57 utilize similar language and clearly and explicitly show a lot, per the Subdivision Map Act, is numbered or lettered and is as depicted on the Map itself. Given that those lots which are numbered or lettered on the Map depict the boundaries as being bordered by named streets/alleys, it seems clear that one must conclude that the Subdivision Map Act intended that the 'lots' depicted on the Map be the only 'lots' subject to the Act's strictures.

Under the reasoning of the courts below we are asked to envision the lots and their boundaries as extending to the center line of the adjacent street.

When Petitioner included language in the deeds which manifested a 'contrary intent', to wit; "[s]pecifically excluding, however, that portion of the alley adjoining said lot [H, I, or J] as closed to public use"; the Appellate Court viewed this as an illegal subdivision of a lot in violation of the Subdivision Map Act; i.e. the vacated street/alleys portion was split from the 'lot' which extended to the center line of the adjacent street (OP, p 3).

This particular reasoning by the Court of Appeal presents a case of "first impression" in this State and one which is not in conformity with existing State law.

In addition to the Appellate Court's interpretation of the term 'lot' and its application to the Subdivision Map Act, (which interpretation is in conflict with existing State law), the utilization or transplanting of a §§ 831 or 1112 'lot' into a Subdivision Map Act analysis constitutes a violation of the doctrine of "Separation of Powers."

As show [sic] previously, the Map Act provides for the establishment of the boundary lines for lots within a subdivision (Govt. Code § 66499.52(a)). The Act itself has as its objective;

> "The regulation of the design, improvement and sale of subdivisions and authorizes conditions for approval of Subdivision Maps." *Pratt v. Adams* (1964) 229 Cal. App. 2d 602, 605 (OP, p 6).

The Act is enabling legislation; it establishes generalized statewide criteria for subdivision planning, but delegates authority to the cities and counties to consider the details of proposed subdivisions. "Regulation and control of the design and improvement of subdivisions

are vested in the legislative bodies of local agencies." The Real Estate Commissioner supervises all subdivision sales in California and his authority extends to any subdivision divided into five or more parcels. (B. & P. Code § 10249 et seq., 11000 et seq.; See generally *Witkins, Summary of California Law,* Ninth Ed., Vol. 4, Real Property §§ 44-51, pp 259-268. The design and control of subdivisions is exclusively a legislative function.

Generally a court is without power to interfere with purely legislative action either at the state or local level. *Bd. of Supervisor v. California Highway Commission* (1976) 57 Cal. App. 3d 952. If a court were to interfere, the interference would violate the doctrine of "Separation of Powers".

The preparation of the final map which delineates and depicts the boundaries of the subdivision including lots, blocks and streets, is done under the direction of and within the exclusive province of the registered civil engineer [Govt. Code §§ 66434 and 66499.52(a), supra]. Land surveying functions are under the jurisdiction of the City Engineer (Govt. Code § 66416.5). There are other sections which set forth the duties of certain municipal employees with regard to the establishment of the boundaries within a subdivision.

The point is that the courts below do not have the power to establish the boundaries of lots except as given to the Court in the Govt. Code beginning with § 66499.21 et seq. Among those procedures are requirements for the initiation of the proceedings such as the filing of the petition signed by two-thirds of the fee owners for alteration in the Office of the County Surveyor (Govt. Code

§ 66499.22); and a new map has to be filed with the petition (Govt. Code § 66499.23); and there are various public notice requirements (Govt. Code § 66499.24).

Needless to say, none of these procedures were undertaken in the case at bar prior to the Trial Court's determination that, contrary to the depiction on Final Map No. 1285, the real boundary line was the center line of the adjacent street and not the street itself. Therefore, utilizing an analysis, albeit incorrect, pursuant to §§ 831 and 1112 of the Civil Code the Trial and Appellate Court determined and established by separate theories, [See, supra, p 8 LL 4-8 Statement of Case Facts, (OP, pp 2-5), next to the last ¶ ; and or "Petition for Rehearing", p 19, LL 7-15 and Fn 2)], a boundary line for purposes of the Subdivision Map Act. This is clearly an interference in an exclusively legislative function and therefore violative of the "Separation of Powers Doctrine".

CONCLUSION

The courts below theories, [See, supra, p 8, LL 4-8 Statement of Case Facts, (OP, pp 2-5), next to the last ¶ ; and or "Petition for Rehearing", p 19, LL 7-15 and Fn 2], proposing a Civil Code §§ 831 or 1112 'lot' can be used instead of a Final Subdivision Map 'lot' in a Map Act case is "first impression" in California and effectively nullifies the Map Act. The impact upon Petitioner is enormous. The opinion contradicts the Map Act, Civil Code §§ 831 and 1112, C.C.P. § 2077(6), and case law of record.

WHEREFORE, Petitioner respectfully requests that this Court grant this "Petition for Review" and order the within appeal transferred to it **OR** summarily reversed

the Courts Opinion below with appropriate instructions based on the laws of the State of California heretofore briefed in this case and pending Case Nos. D017742 and D018419.

Respectfully submitted,

Dated: July 16, 1993

/s/ James E. Smith
James E. Smith @1206
Propria Persona for
Appellant

APPENDIX "A"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

MARGARET L. ROULETTE et al., Plaintiffs, Cross-Defendants and Respondents, v. JAMES E. SMITH, Defendant, Cross-Complainant and Appellant.	D017058 (Super. Ct. Nos. N49451 & N51351) (Filed Jun. 9, 1993)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald L. Johnson and William D. Howatt, Jr., Judges. Affirmed.

James E. Smith appeals a summary judgment in favor of Margaret Roulette, S. Scott and Robin S. Emsley and the City of Del Mar (City) finding Smith illegally subdivided lots, that the buyers, Roulette and the Emsleys, are entitled to recission [sic] and damages and finding the City was not liable to Smith. On appeal, Smith contends the court erroneously determined he illegally subdivided the lots by retaining a portion of the adjoining alley and erred in finding there were no material issues of fact as to the right of Roulette and the Emsleys to void the conveyances from Smith. The first issue Smith raises in this case, he also raised in *Smith v. City of Del Mar* (Apr. 27, 1993) D015814 [nonpub. opn.], and we resolve the issue against him in that case. We find the reasoning in that case persuasive and affirm this judgment, repeating much of the analysis used in *Smith v. City of Del Mar.* We also affirm on the second issue, finding summary judgment was properly granted on Roulette's and the Emsley's causes of action for recission [sic].

FACTS

This cases [sic] involves several lots in a 20-acre property in Del Mar known as the Snakewall property. The property was subdivided into 20 lots between 1910 and 1913.[1] The Snakewall subdivision also contained

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[1] The 20 lots were created by three subdivision maps and therefore, technically, involve three subdivisions. For the sake of convenience, since in this opinion we are only addressing the subdivided lots within the Snakewall property, we use the singular "subdivision" when referring to 20 lots within the Snakewall property.

several streets and alleys which were dedicated to the county for public use. Lots H, I and J bordered an alley.[2] The subdivision is depicted in a series of maps showing the various lots and a number of streets and alleys bisecting the subdivision and lying adjacent to the various lots. The subdivision maps do not contain any metes and bounds descriptions of the particular lots but a graphic representation and numerical measurements of the lots and their locations.

In 1925, the county vacated and abandoned the streets and alleys contained in the Snakewall subdivision, including the alley adjacent to lots H, I and J.

Smith bought the property in 1977. At the time he bought the property, the 20 lots had been merged into one parcel. The property was unmerged in 1985 and the original subdivision was reinstated. In 1987, the City passed a resolution stating, inter alia, "The Snakewall Property is comprised of 20 lots of record which can be developed in accordance with the Municipal Code." (City of Del Mar Resolution No. 87-71.)

In 1988, Smith sold Lot H to Scott and Robin Emsley and sold Lots I and J to Robin Emsley's mother, Margaret Roulette. Smith sold the lots by reference to their map numbers on the 1910 subdivision map (i.e., "H," "I" and "J") but stated the grant was "[s]pecifically excluding, however, that portion of the alley adjoining said Lot (H, I

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[2] These lots also bordered a street on the perimeter of the Snakewall property which is not at issue here and will not be further referred to.

or J] as closed to public use." Smith desired to retain ownership of the alley.

In September 1990, Roulette and the Emsleys filed applications with the City to obtain certificates of compliance. The City planning staff concluded their lots in the original subdivision had included the adjacent alley to its centerline and that Smith's retention of the alley portion of the lots resulted in an illegal subdivision. The staff recommended the City issue conditional certificates of compliance for the "New" lots H, I and J (i.e., the lots minus the adjacent alley portion created by the 1988 sales as opposed to the "Old" lots of the original subdivision) subject to the following condition:

> "Prior to the issuance of a permit or other grant of approval for development of the properties, the portions of the alley, vacated by the County, and retained by the seller, during the [1988] sale must be acquired and added to the New Lots in question. Or in the alternative, a parcel map or subdivision map shall be accomplished to show the alley as separate and a part from the New Lot."

After hearing and notice to Roulette, the Emsleys and Smith, the City notified Roulette and the Emsleys of the City's intent to record a notice of violation involving their lots and the adjacent alley. The notice stated Roulette and the Emsleys had 15 days to respond to the notice and a failure to respond would be construed as a waiver of the right to object and the City would record the notice of violation. The attorney for Roulette and the Emsleys wrote the City confirming a request to continue the hearing to November 12, 1990 but concluding that since the

"Owners have no additional evidence that might persuade the City that Lots H, I and J as conveyed to the Owners are not illegal lots, the Owners have no basis to object to the recording of the notices of violation." Roulette and the Emsleys had spent nearly a year attempting to obtain certificates of compliance from the City, their efforts involving phone calls, letters and providing additional information to the City as well as their filing applications for certificates of compliance. The City recorded notices of violation regarding Lots H, I and J on October 30, 1990.

On November 20, 1990, Roulette and the Emsleys filed suit against Smith seeking recission [sic] and damages based on various theories, including Smith's violation of the Subdivision Map Act.

The next day Smith offered to transfer the alley portions of Lots H, I and J to Roulette and the Emsleys. Roulette and the Emsleys refused to accept the transfers, electing to proceed instead with their own legal actions. Smith had confirmed with the City's engineer that transfer of the alleys to buyers would "solve [the] problem."

Smith cross-complained against the Roulettes and Emsleys and against the City of Del Mar alleging causes of action based on indemnity, fraud, breach of the covenant of good faith and fair dealing, conspiracy, intentional interference with contractual relationships and negligent interference with economic relationship.

All parties moved for summary judgment. The trial court granted summary judgment in favor of Roulette and the Emsleys on their causes of action for damages

and recission [sic] based on Smith's violation of the Subdivision Map Act. The trial court denied Smith's motions for summary judgment on its cross-complaint, finding in favor of Roulette, the Emsleys and the City. The court ordered Smith to pay damages of $1,046,012.81.

DISCUSSION

I

Subdivision Map Act Violation

Smith contends the court erred in determining he violated the Subdivision Map Act by retaining the adjacent alley when he sold lots H, I and J to Roulette and the Emsleys.

The objective of the Subdivision Map Act is "to regulate and control the design and improvement of subdivisions." (*Pratt v. Adams* (1964) 229 Cal.App.2d 602, 606.) "Subdivision" is defined as:

> "the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease or financing, whether immediate or future except for leases of agricultural land for agricultural purposes. Property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement or railroad rights-of-way. . . . " (Gov. Code, § 66424.)[3]

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[3] Smith asserts he did not illegally subdivide the lots based on his interpretation of the county assessment roll. First, we

Under the Act, before an owner may legally subdivide property for the purpose of sale, lease or financing, he generally must obtain approval of either a subdivision or parcel map. (See Gov. Code, §§ 66426, 66428.) Certain lot line adjustments, however, do not require filing a parcel or subdivision map.

Government Code section 66412, which governs exceptions to the map requirements, in pertinent part, provides:

> "This division [i.e., the Subdivision Map Act] shall be inapplicable to:
>
> ". . . .

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note the assessment roll does not contradict the Subdivision Map Act by clearly indicating the alleys were separate from the lots. Second, the assessment roll is not necessarily determinative. As one authority has explained: "The phrase 'latest equalized county assessment roll' was included in the Subdivision Map Act's definition of 'subdivision' (Gov C § 66424) to provide a convenient method of identifying the property being divided and its ownership during a given period of time. [Citation.] It is often misunderstood as permitting the owner to convey assessor's parcels without first obtaining a subdivision map. the assessor's parcel designations have no effect on application of the Map Act, however, the owners may not divide land along the lines of the assessor's parcels for the purpose of sale, lease, or financing without obtaining a subdivision map. The function and purpose of the assessor is to raise revenue and not to regulate the division of land. [Citations.]" (Cal. Subdivision Map Act Practice (Cont.Ed.Bar 1987) § 2.6, p. 24.) Finally, we note Smith acknowledged this point below, i.e., that the subdivision map is controlling in his declaration filed on May 2, 1991 when he stated: "It is my understanding that the tax assessor's map does not establish legal lot lines; *they are established by the subdivision map.*" (Emphasis added.)

"(d) A lot line adjustment between two or more existing adjacent parcels, where the land taken from one parcel is added to an adjacent parcel, and where a greater number of parcels than originally existed is not thereby created, provided the lot line adjustment is approved by the local agency, or advisory agency. A local agency or advisory agency shall limit its review and approval to a determination of whether or not the parcels resulting from the lot line adjustment will conform to local zoning and building ordinances. An advisory agency or local agency shall not impose conditions or exactions on its approval of a lot line adjustment except to conform to local zoning and building ordinances, to require the prepayment of real property taxes prior to the approval of the lot line adjustment, or to facilitate the relocation of existing utilities, infrastructure, or easements. No tentative map, parcel map, or final map shall be required as a condition to the approval of a lot line adjustment. The lot line adjustment shall be reflected in a deed, which shall be recorded. No record of survey shall be required for a lot line adjustment unless required by Section 8762 of the Business and Professions Code."

The City has adopted an ordinance addressing lot line adjustments which provides:

"Notwithstanding any other provisions of this Title to the contrary, every person desiring to adjust a legal lot line between two or more adjacent lots, where the land taken from one lot is added to an adjacent lot, without creating a greater number of lots, shall comply with the

procedures set forth in this Chapter for obtaining a parcel map for lot line adjustment." (Del Mar City Ordinance, § 24.70.010.)

Under the Subdivision Map Act, if a local agency "has knowledge that real property has been divided in violation of the [Subdivision Map Act] or local ordinances enacted pursuant [to the Act], it shall cause to be mailed . . . a notice of intention to record a notice of violation. . . . " (Gov. Code, § 66499.36.) If the local agency determines there has been a violation of the Subdivision Map Act, it is required to file a notice of violation which "when recorded, shall be deemed to be constructive notice of the violation to all successors in interest in such property." (Gov. Code, § 66499.36.)

The Subdivision Map Act prohibits transactions in violation of the Act (Gov. Code, § 66499.30) and provides that a person who violates any provision of the Act is guilty of a misdemeanor or felony (Gov. Code, § 66499.31). The Act also provides various remedies to the buyers of illegally subdivided property and permits the local agency to seek other legal, equitable or summary remedies including an injunction to restrain any attempted or proposed subdivision or sale in violation of the Act. (Gov. Code, §§ 66499.32, 66499.33.) Further, the Act bars a local agency from issuing a permit or granting approval necessary to develop real property which has been divided in violation of the Act. (Gov. Code, § 66499.35.)

II

The Snakewall Property Lot Lines

Smith contends he did not subdivide any land or violate the Subdivision Map Act by retaining title to the alley adjoining lots H, I and J because the alley was not part of the lots at the time he sold the lots.

Under California law, it is presumed a person owning land adjacent to a road owns the land to the center of the road unless the contrary is shown. (Civ. Code, § 831.) This presumption " 'is highly favored in the law.' " (*Machado v. Title Guarantee and T. Co.* (1940) 15 Cal.2d 180, 183; *Pilkington v. Fausone* (1970) 11 Cal.App.3d 349, 351-352.) Civil Code section 1112 further provides that when a person transfers land adjacent to a road, it is presumed he transfers title to the center of a road unless the grant shows a different intent. Under the presumption of Civil Code section 1112, if a property owner sells a lot adjacent to a road by referring to a recorded map, the buyer generally acquires title to the centerline of the adjoining street. (*Neff v. Ernst* (1957) 48 Cal.2d 628, 635; *Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1132.)[4]

When a street in a subdivision is dedicated to the government, the public generally acquires only an easement for the right of way; an adjacent landowner who owns the fee title to the center of the street retains the fee interest but has no right to possession or occupancy of any portion of the street. (*Safwenberg v. Marquez* (1975) 50

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[4] Contrary to Smith's contention, there is no indication the Legislature intended these presumptions to apply only in quiet title actions.

Cal.App.3d 301, 307-308; *Baker v. Ramirez, supra,* 190 Cal.App.3d 1123, 1132.) If the government vacates or abandons the street, then ownership reverts to the fee owners, usually the adjacent landowners. (*Baker v. Ramirez, supra,* 190 Cal.App.3d 1123, 1132; *Severo v. Pacheco* (1946) 75 Cal.App.2d 30, 34; Miller & Starr, Cal. Real Estate (2d ed. 1989) § 15.80, p. 605.)

"The policy behind the law is to avoid ownership in land in strips and gores by attaching the underlying fees of streets, both active and abandoned, to the adjoining lots." (*Safwenberg v. Marquez, supra,* 50 Cal.App.3d 301, 306.)

Here, the original Snakewall subdivision contained various streets and alleys which were dedicated to the County of San Diego. Under the Civil Code, it is presumed each lot in the Snakewall property which was adjacent to a street or alley extended to the centerline of the street or alley subject to the public's easement to use the streets and alleys. Smith presented no evidence to show the original subdivider had any other intent. Thus, at the time of the original subdivision, lots H, I and J included half of the adjacent alley.

In 1925, the county vacated and abandoned the Snakewall streets and alleys. As a result, those portions of lots H, I and J which were subject to the public easement (i.e., one-half of each portion of the adjacent alley) reverted to those lots. (See, e.g., *Pilkington v. Fausone, supra,* 11 Cal.App.3d 349, 351-352.)

In 1988, when Smith sold lots H, I and J, he retained the alley portions of the lots. He thus subdivided the lots, creating new units of land by dividing the alley portions

from the adjacent lots. These were not mere lot line adjustments, exempted from the requirement of filing a parcel or subdivision map (Gov. Code, § 66412, subd. (d)), because Smith did not merely adjust the lot lines among the lots creating no new parcels; he created new parcels, i.e., the alley units which he had retained when he sold the lots. (Contract *San Dieguito Partnership v. City of San Diego* (1992) 7 Cal.App.4th 748 (readjustment of lot lines of nine parcels so that all could have road frontage).) Smith further violated the Subdivision Map Act by failing to obtain government approval for his changes in the lot lines. (Gov. Code, § 66412, subd. (d).)

III

Purchaser's Right to Void Deed

Smith contends the court erred in granting summary judgment on the cause of action for recission [sic] because he asserts there were triable issues of fact as to whether Roulette and the Emsleys were entitled to void the conveyance.

"The Subdivision Map Act clearly is designed to restrict activities of the subdivider – the one 'who causes land to be divided into a subdivision' [citation]. Its prohibition [citation] and its penal sanctions [citation] run only to the affirmative act of selling or offering for sale, and not to purchase." (*Keizer v. Adams* (1970) 2 Cal.3d 976, 979.) The Act does not require innocent purchasers to suffer for violations committed by his grantor or predecessors. (*Ibid.; Stell v. Jay Hales Development Co.* (1992) 11 Cal.App.4th 1214, 1228.)

The Legislature has provided remedies for a buyer of land that was illegally subdivided in Government Code section 66499.32:

> "(a) *Any deed of conveyance,* sale or contract *to* sell *real property which has been divided,* or which has resulted from a division, *in violation of the provisions of this division,* or of the provisions of local ordinances enacted pursuant to this division, *is voidable at the sole option of the grantee,* buyer or person contracting to purchase, his heirs, personal representative, or trustee in insolvency or bankruptcy within one year after the date of discovery of the violation of the provisions of this division or of local ordinances enacted pursuant to the provisions of this division, but the deed of conveyance, sale or contract to sell is binding upon any successor in interest of the grantee, buyer or person contracting to purchase, other than those above enumerated, and upon the grantor, vendor, or person contracting to sell, or his assignee, heir or devisee.
>
> "(b) *Any grantee,* or his successor in interest, *of real property which has been divided,* or which has resulted from a division, *in violation of the provisions of this division* or of local ordinances enacted pursuant thereto, *may,* within one year of the date of discovery of such violation, *bring an action* in the superior court *to recover any damages he has suffered by reason of such division* of property. The action may be brought against the person who divided the property in violation of the provisions of this division or of local ordinances enacted pursuant thereto and against any successors in interest who have actual or

constructive knowledge of such division of property.

"The provisions of this section shall not apply to the conveyance of any parcel of real property identified in a certificate of compliance filed pursuant to Section 66499.35 or identified in a recorded final map or parcel map, from and after the date of recording.

"The provisions of this section shall not limit or affect in any way the rights of a grantee or his successor in interest under any other provision of law." (Emphasis added.)

Smith, in his brief on appeal gives short shift to this argument. His argument that there are material issues of fact existing which could defeat the right of Roulette and the Emsleys to void their deed appears to be based on evidence of their refusal to accept conditional certificates of compliance and insistence the City file notices of violation and the fact Smith tendered deeds to the alley portion in dispute which would have cured the violation.

We find no merit to this argument. First, we note Smith's characterization of Roulette and the Emsleys as "insisting" the City file the notices of violation mischaracterizes the evidence. Undisputed evidence established Roulette and the Emsleys attempted for nearly a year to obtain a certificate of compliance for their lots and acceded to the City's filing of the notices of violation only when it became apparent the City had determined the lots were illegally subdivided. The failure of Roulette and the Emsleys to pursue futile arguments at a hearing is a far cry from an "insistence" the City file the notices of violation.

Second, as to Smith's contentions Roulette and the Emsleys are barred from seeking recission [sic] because they refused to accept a conditional certificate of compliance or to accept Smith's tender of the alley portions he had retained, we note this is essentially an argument Roulette and the Emsleys had an obligation to attempt to cure the defects in their illegally subdivided lots. Under the Subdivision Map Act, while a buyer of an illeally subdivided lot may seek to cure a defect in a lot by applying for a certificate of compliance, approval for a division of the property or by obtaining from the grantor the remainder of the property, the Subdivision Map Act does not impose a requirement on innocent purchasers such as Roulette and the Emsleys to cure the defect. Instead, the Subdivision Map Act gives the buyer an unequivocal right to void a conveyance of illegally subdivided property. Government Code section 66499.32 provides a deed to an illegally subdivided property "is voidable *at the sole option of the grantee [or] buyer.*" Smith would negate this provision by denying the buyer the option of voiding the conveyance whenever the grantor elected to attempt to cure the defect. In other words, Smith would give control over the option of voiding the deed to the grantor, not the grantee, a scenario which is directly contrary to the statutory scheme.

Smith also contends Roulette and the Emsleys were not entitled to void their deeds under the next to last paragraph of Government Code section 66499.32, subdivision (b) providing, "The provisions of this section shall not apply to the conveyance of any parcel of real property identified in a certificate of compliance filed pursuant to Section 66499.35 or identified in a recorded final map or

parcel map, from and after the date of recording." Smith contends Roulette and the Emsleys possessed certificates of compliance under Government Code section 66499.35, subdivision (d).

Government Code section 66499.35, subdivision (d) provides: "A recorded final map or parcel map shall constitute a certificate of compliance with respect to the parcels of real property described therein."

This argument is but a variation of Smith's argument he did not violate the Subdivision Map Act because he sold the lots as shown on the subdivision map. As we have previously explained, Smith sold Roulette and the Emsleys only part of Lots H, I and J, retaining the alley portion of those lots for himself; Smith did not sell the same lots as those depicted on the subdivision map. Therefore, Government Code section 66499.35, subdivision (d) does not apply.[5]

DISPOSITION

The judgment is affirmed.

/s/ Kremer
KREMER, P.J.

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[5] Smith also generally asserts there are triable issues of fact as to whether waiver or estoppel applies but makes no further argument on these issues, neither citing evidence or authorities to support his claim. "Where a point is merely asserted . . . without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the reviewing court. [Citation.]" (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647; *Jimmy Swaggart Ministries v. State Bd. of Equalization* (1988) 204 Cal.App.3d 1269, 1294.)

WE CONCUR:

/s/ Froehlich
FROEHLICH, J.

/s/ Nares
NARES, J.

STAMP

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARGARET L. ROULETTE et al., Plaintiffs, Cross-defendants and Respondents, v. JAMES E. SMITH, Defendant, Cross-complainant and Appellant.	D017058 (Super. Ct. No. N 49451) ORDER MODIFYING OPINION [No Change in Judgment] (Filed Jul 1, 1993)

THE COURT:

The opinion filed June 9, 1993, is modified as follows:

On page one delete superior court number N51351 and change the middle initial of William D. Howatt, Jr. from D. to J.

On page two footnote two should read: Each lot also borders a street which is not at issue here and will not be further referred to.

As modified, the petition for rehearing is denied.

There is no change in the judgment.

/s/ Kremer
KREMER, P.J.

Copies to: All parties

APPENDIX C

CIVIL NO. S033948
D017058
(Super. Ct.
No. N49451)

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

MARGARET L. ROULETTE, S. SCOTT EMSLEY
AND ROBIN S. EMSLEY,

Plaintiffs and Respondents,

v.

JAMES E. SMITH
Defendant and Appellant.

AND RELATED CROSS-ACTION

Appeal from the San Diego County Superior Court
Hon. Ronald L. Johnson and
William J. Howatt, Jr., Judges

ANSWER TO PETITION FOR REVIEW

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CIVIL NO. S033948

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Plaintiffs and Respondents,

v.

JAMES E. SMITH
Defendant and Appellant.

AND RELATED CROSS-ACTION

ANSWER TO PETITION FOR REVIEW

I.

INTRODUCTION

The petition of defendant/appellant James E. Smith ("Smith") shows great persistence (or stubbornness), but no merit. Unwilling to accept this Court's prior refusal to review the Subdivision Map Act issues decided against him by two different trial judges and the Court of Appeal (in two separate actions). Smith once again petitions this Court for review of the same issues. Again, he fails to demonstrate any need for review of these issues. He identifies no conflict among the courts of appeal. The Court of Appeal in this case applied established principles of law. Smith's petition on the Map Act issues should therefore be denied, once again.

As to the "separation of powers" argument made in Smith's petition, it cannot even be dignified with the label "issue." It is an illogical and unsupportable attempt to *create* an issue where none exists. The courts below decided a controversy before them which required reference to, and interpretation of, statutory provisions. That is one of their proper roles. Smith's frivolous argument to the contrary, which was not timely raised in the Court of Appeal, provides absolutely no basis for review by this Court.

II.

SUMMARY OF FACTS AND PROCEDURAL BACKGROUND

Smith was the owner of certain undeveloped, subdivided lots in the City of Del Mar which included portions of adjacent streets and alleys. However, when he sold

certain of those lots (the "Lots") to plaintiffs/respondents Margaret Roulette, S. Scott Emsley, and Robin Emsley ("Buyers") in 1988, Smith retained those street and alley portions for himself without obtaining a lot line adjustment or otherwise complying with the Subdivision Map Act. The City of Del Mar and its City Council (the "City") determined that this action by Smith violated the Subdivision Map Act, and issued Notices of Violation on the Lots. Buyers then filed this action against Smith to obtain their statutory remedies of rescission and damages. Cal. Gov't Code §§ 66499.32(a) and (b). Smith cross-complained against the City in this action, and also filed a separate Writ of Mandamus against the City (the "Mandamus Action"), challenging its determination. Buyers were not parties to the Mandamus Action.

In separate proceedings in the two actions, two different trial court judges reviewed the Map Act issues, decided Smith had violated that Act, and entered judgments against him. Those decisions were both upheld by the Fourth District Court of Appeals. Smith has already sought review by this Court of the Map Act issues in the Mandamus Action; his petition was denied. (Case No. S033083.) Smith now petitions in this case for review of the same Map Act issues.

III.

SMITH'S PETITION FOR REVIEW SHOULD BE DENIED

Smith baldly asserts that review by this Court is "necessary to secure uniformity of decision and settlement of important questions of law," and that the Court

of Appeal "lack[ed] jurisdiction." (Smith Petition for Review ("Smith Petition") p. 4.) While Smith correctly parrots the language of California Rule of Court 29 as to grounds for review, his brief completely fails to show how or why those principles apply to the present case. It is obvious from his brief and the record below, and in fact this Court has already determined, that there simply is no legitimate ground, and no *need*, for review in this case.

A. THIS COURT HAS ALREADY CORRECTLY REFUSED TO REVIEW THE SUBDIVISION MAP ACT ISSUES PRESENTED BY SMITH

This Court has already considered and rejected review of the first two "issues" listed in Smith's current petition. While his description of the issues has changed somewhat, Smith's basic argument in this petition is the same as in his prior petition in the Mandamus Action: that the Court of Appeal erred in holding that he violated the Map Act when he sold Buyers the Lots while retaining the adjacent streets and alleys. Smith gives no reason for this Court to reverse its decision on the Mandamus Action petition and grant review in this case of the same issues previously rejected.

Smith does not, and indeed cannot, argue that there is any conflict between the courts of appeal on the issues raised in this action. The Court of Appeal in this action applied established, consistent authority to determine those issues. What Smith argues instead is that the Fourth District Court of Appeal incorrectly applied the Map Act

and Civil Code to his particular fact situation. His dissatisfaction with the particular result in his case does not require or justify review by this Court.

Smith in his petition attempts to argue the merits of the Map Act issues. However, given his failure to demonstrate any need for review of these issues, this Court need not consider that argument. To the extent the Court wishes to do so, Buyers attach hereto the portion of their appellate brief which addresses the Map Act issues, detailing the extensive authority which supports the trial courts' and Court of Appeal's decisions in their favor.[1] All of Smith's arguments were fully argued and considered below in two separate actions, by two different trial judges and the Court of Appeal. There is no need for further review by this Court.

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[1] Buyers' brief does not address *Earl v. Dutour*, 181 Cal. 58 (1919). cited in Smith's petition, because Smith first cited that case in his appellate reply brief. *Earl* is inapplicable to the present action. As this Court stated about *Earl* and two other cases: "In none of these cases was the direct question involved as to whether a street is a part of the lot abutting thereon." *Allan v. City and Co. of San Francisco*, 7 Cal. 2d 642, 647-48 (1936) (holding in a case where that *was* the direct question that lots include adjacent streets and alleys). *See also Anderson v. Citizens Sav. & Trust Co.*, 185 Cal. 386, 393 (1921) ("the fee in half the street upon which the lot abuts is in fact part of the lot"). As in *Allan* and *Anderson*, the question in the present action *was* whether the adjacent streets and alleys were part of the Lots. In addition, in *Earl* the parties did not have possession or occupancy rights to the street at issue, while the present action involves abandoned roadways to which Smith had such rights. *See Baker v. Ramirez*, 190 Cal. App. 3d 1123, 1132 (1987) (distinguishing *Earl*).

B. SMITH'S SEPARATION OF POWERS ARGUMENT IS UNTIMELY AND FRIVOLOUS

Preliminarily, Smith's petition on the "separation of powers issue" should be denied on procedural grounds. This Court is authorized to "review the decision of a court of appeal in any cause." Cal. Const. Art. VI, § 12(b). As a matter of policy, this Court normally will not consider "any issue that could have been but was not timely raised in the briefs in the Court of Appeal." Cal. Rule of Ct. 29(b)(1). "Separation of powers" was not even mentioned in Smith's Court of Appeals briefs in this case.[2] It is apparently being raised now in this Court in an untimely, last-ditch effort to invent a bogus basis for potential United States Supreme Court review. This Court should refuse to consider this new argument which was not timely raised in the Court of Appeal.[3]

Substantively, Smith's separation of powers argument is patently ridiculous. "The judicial function is to 'declare the law and determine the rights of the parties under it' " in the particular controversy before the court. *Marin Water & Power Co. v. Railroad Comm'n*, 171 Cal. 706, 711 (1916) (citing *Frasher v. Rader*, 124 Cal. 132 (1899)). That is exactly what the lower courts have done in the present action. They were presented with a controversy between Smith and Buyers in an action which the state

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[2] Indeed, Buyers cannot find any reference to this argument in the trial court record of this case below.

[3] Smith gives no reason to this Court for his omission of this argument from his Court of Appeal filings. He relies on authority which pre-dates those filings.

legislature specifically authorized in the Map Act.[4] The courts reviewed and applied the Map Act and Civil Code to that controversy. There is no "separation of powers" issue here.

Smith quotes several sources, including the Map Act itself, for the proposition that cities and counties, and their legislative bodies, are to determine subdivision issues. He then argues that the courts must not "interfere" with these local agencies' determinations. (Smith Petition pp. 16-17.) If that is true, Smith should not be before *this* Court seeking *its* "interference." It was the City of Del Mar and its City Council who determined in the first instance that Smith had violated the Map Act. Smith *himself* sought intervention by the courts in his cross-complaint and Writ of Mandamus action, requesting that the courts reverse the City's decision.[5] Smith only

---

[4] California Government Code Section 66499.32(b) provides: "Any grantee . . . of real property which has been divided, or which has resulted from a division, in violation of the [Act] may . . . bring an action in the superior court to recover any damages he has suffered by reason of such division of property. . . . "

[5] Curiously, Smith cites *Bd. of Supervisors v. California Highway Comm'n*, 57 Cal. App. 3d 952 (1976), a case which merely holds that mandamus is not an appropriate remedy for reviewing the California Highway Commission's decisions regarding highway project priority and allocation of funds. This case has no application to the present action, which involves private parties bringing a statutorily established cause of action against another private party. In addition, *Bd. of Supervisors* involved an improper attempt to have the courts compel a government agency to make its decision in a certain manner. The present action, by contrast, involves completely proper court review of the City's determination of a legal issue.

calls the courts' actions "interference" and complains now because he does not like the result – the lower courts affirmed the City's determination that Smith violated the Map Act. To Smith, there is no "separation of powers" unless the courts and the local agency disagree, with the courts presumably holding in his favor. This totally illogical argument by Smith does not provide any basis for review.

IV.

CONCLUSION

Smith's petition completely fails to demonstrate any reason for review of the Court of Appeal's decision in this action. This Court has already declined to review the Subdivision Map Act issues raised for the second time in this Court by Smith. There is no conflict on these issues among the Courts of Appeal. The Court of Appeal decision in this action was based on established authority. Smith's "separation of powers" argument, which borders on the bizarre, is untimely and completely meritless. Smith has had more than his share of days in court. Buyers therefore respectfully request that Smith's petition for review be denied by this Court.[6]

Respectfully submitted,

SCALONE STIPANOV YAFFA &
MEBANE

---

[6] Buyers would be delighted to see the Court of Appeal decision herein published, as demanded by Smith. However, Buyers defer to the Court of Appeal and this Court on that point.

Dated: July 31, 1993

By /s/ Kristine P. Nesthus
KRISTINE P. NESTHUS

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ATTACHMENT

CIVIL D017058

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

JAMES E. SMITH, and DOES 1 through 15, inclusive,

Petitioner,

v.

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND
ROBIN S. EMSLEY,

Respondents.

AND RELATED CROSS-ACTION.

APPEAL FROM THE SUPERIOR COURT
SAN DIEGO COUNTY

HON. RONALD L. JOHNSON AND
WILLIAM D. HOWATT, JR., JUDGES

C-12

OPPOSITION BRIEF OF RESPONDENTS MARGARET L. ROULETTE, S. SCOTT EMSLEY, AND ROBIN S. EMSLEY

(Filed Jan. 13, 1993)

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ARGUMENT

I.

BECAUSE THE LOTS INCLUDED THE STREETS AND ALLEYS PRIOR TO THE SALE TO BUYERS, SELLER'S EXCLUSION OF THE STREETS AND ALLEYS FROM HIS CONVEYANCE TO BUYERS CONSTITUTED AN ILLEGAL SUBDIVISION, ENTITLING THE BUYERS TO RESCISSION AND DAMAGES

A. THE LOTS WHICH EXISTED PRIOR TO THE SALE BY THE SELLER TO THE BUYERS INCLUDED THE ADJACENT STREET AND ALLEYS

In the present action, it is undisputed that when the Seller conveyed Lots H, I and J to the Buyers, he specifically retained title to the alleys adjacent to those Lots. It is also undisputed that the Seller is relying only on the 1910 Subdivision Map as to the legality of this transfer. The Seller agrees that a determination of whether he violated the Subdivision Map Act thus turns on the basic question of whether Lots H, I and J included the adjacent alleys. Despite the Seller's arguments to the contrary, the 1910 Subdivision Map, the statutory presumptions concerning ownership of roadways, and the Seller's own conduct all lead to the inescapable conclusion that the adjacent streets and alleys *were* in fact part of the Lots at the relevant point in time – *prior to the Seller's transfer to the Buyers.*

1. THE 1910 SUBDIVISION MAP DID NOT CREATE SEPARATE LOT(S) OF THE STREETS AND ALLEYS

The 1910 Subdivision Map shows a number of separate lots, each designated by a letter. There is *no* letter

assigned to the Streets and Alleys designating them as a separate lot or lots. The County officials who approved the Subdivision Map clearly did not intend to create separate lots of the Streets and Alleys. To do so would be *completely irrational* from a planning standpoint and contrary to clearly defined public policy. *See, Graber v. City of Sacramento,* 2 Cal. 2d 432, 41 P. 2d 543-545 (1935) (". . . ordinarily one who lays out and sells lots in a subdivision intends to part with title to the center of the streets.").

One of the Act's purposes is "to regulate and control the design and improvement of subdivisions." *Pratt v. Adams,* 229 Cal. App. 2d 602, 605 (1964). It would make no sense to plan a subdivision so as to allow a developer to sell off lots to individual owners and then separately deed the streets within that subdivision, which are necessary for access by those owners, to someone else.

The only logical interpretation of the Subdivision Map on its face, and consistent with planning considerations and public policy, is that the lots H, I and J which the Seller could legally transfer under the Map Act *included* portions of the adjacent Streets and Alleys. That interpretation is also supported by application of the presumptions concerning ownership of roadways and by the Seller's own actions in specifically excepting the Streets and Alleys out of his deeds to Buyers.

2. THE STATUTORY PRESUMPTIONS CONCERNING OWNERSHIP OF ROADWAYS APPLY TO DEFINE THE LOTS AS INCLUDING THE ADJACENT STREETS AND ALLEYS

The Seller recognizes the general presumption under California law that "[a]n owner of land bounded by a

road or street is presumed to own to the center of the way." Cal. Civil Code § 831; *Abar v. Rogers*, 23 Cal. App. 3d 506, 512 (1972) ("[W]here land is dedicated as a public street the owner of the abutting property is presumed to be the owner of the fee to the street's center.") This presumption is "highly favored in the law." *Machado v. Title Guarantee & Trust Co.*, 15 Cal. 2d 180, 185 (1940).

Despite the Seller's efforts to distinguish away Section 831, the presumption clearly applies in cases such as the present action, where there is a dispute as to the boundaries of lots governed by a subdivision map which are adjacent to abandoned streets and alleys. *Anderson v. Citizens Sav. & Trust Co.*, 185 Cal. 386 (1921); *Baker v. Ramirez*, 190 Cal. App. 3d 1123 (1987); *Safwenberg v. Marquez*, 50 Cal. App. 3d 301 (1975).

Anderson involved property sold pursuant to a subdivision map. The map showed numbered lots adjacent to dedicated streets. As in this case, the streets were subsequently abandoned by the county. The California Supreme Court, in determining ownership of a portion of an abandoned street adjacent to a particular lot in the subdivision, applied the presumption of ownership to the centerline of the street:

> A description of a lot as that shown on a certain map is a description of it as bounded by a street when the map shows it to be so bounded, so that to such a description the same reason and the same rule apply. . . . Putting it another way, *the fee in half the street upon which the lot abuts is in fact part of the lot*, so that a conveyance of the lot conveys the fee in the street as part of it.

185 Cal. at 393 (citation omitted and emphasis added).

Similarly, in *Baker*, the property at issue was originally part of a larger property owned by one person. The larger property was subdivided pursuant to a recorded subdivision map showing various numbered lots on either side of a street. The street originally was a dedicated public road, but was subsequently abandoned by the county. The issue before the Court involved the ownership of a portion of the abandoned street. In deciding that issue, the Court of Appeal considered the effect of the subdivision map and the street abandonment on the ownership issue and concluded:

> Where property is sold by reference to a recorded map, the grantee generally takes to the center of the street shown on the map as bounding the property. . . . *Thus, each lot deeded to John Maddock in 1911 carried with it the half of Bravo Street abutting that lot.*

190 Cal. App. 3d at 1132 (citation omitted and emphasis added). *See also Neff v. Ernst*, 48 Cal. 2d 628, 635 (1957) (also following *Anderson* rule); *Murray v. Title Ins. & Trust Co.*, 250 Cal. App. 2d 248, 252-256 (1967) (applying rule to various scenarios).[12] Thus, while the Seller cites Baker as authority in his favor, Baker clearly supports the trial courts' decisions herein.

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[12] This result obtains regardless of whether the same person owns the entire parcel. *Baker*, 190 Cal. App. 3d 1132 (holding portions of streets shown on subdivision map were part of adjacent lots even though the lots at prior point in time had a common owner); *Murray*, 250 Cal. App. 2d at 254 (similar holding). Thus, the fact that Smith and his predecessors herein once owned the entire Snakewall property does not defeat the presumption.

Finally, the Court of Appeal in *Safwenberg*, following the Supreme Court's decision in *Anderson*, reached the same result on similar facts. 50 Cal. App. 3d at 307. In *Safwenberg*, there was a dispute about ownership of an abandoned street shown on a subdivision map next to numbered lots. The Court held that "fee title in the land underlying [the abandoned street] was always in the abutting land owners as a matter of law." Id. at 308 (emphasis added).

The statutory presumption that ownership extends to the center of streets is supported by well-recognized public policies. First, "[t]he law of real property abhors the proliferation of gores and strips under separate ownership. . . . " *Murray*, 250 Cal. App. 2d at 254. See also *Safwenberg*, 500 Cal. App. 3d at 306 ("[t]he policy behind the law is to avoid ownership in land in strips and gores").[13] Several other policy considerations are served, as well:

> [T]here is no object in the grantor's retaining a narrow strip of land which is of little or no value to him when separated from the adjoining land; that the value of the land to a purchaser would be greatly affected if the abutting street were not included in the conveyance; that such a

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[13] This policy applies in a situation like that in the present action, where one person originally owns all of the streets and the adjoining lots and then deeds lots on one side of the street to another. That was the situation in Safwenberg, where the Court stated that in such a situation, if a portion of a street were found to belong to the original owner of the entire parcel and not to such a transferee, "the public policy would be defeated because the land would be divided into a strip, even though [the original owner] had adjacent land." 50 Cal. App. 3d at 306.

> rule will guard against [illegible]ation and disputes between owners of land adjacent to public highways; that retention of such a narrow strip of land would retard the improvement and further alienation of the adjoining property [citation]; and that "if no other reason could be assigned to this rule . . . the general understanding of the people, and the extensive and immemorial practice of claiming and acquiescing in such rights ought to have great weight."

Hixson v. Jones, 253 Cal. App. 2d 860, 865 (1967) (quoting *Los Angeles City High School Dist. v. Swensen*, 226 Cal. App. 2d 574, 579-580 (1964) (citations omitted)).

In the present action, as in *Anderson*, *Baker*, and *Safwenberg*, Lots H, I and J were part of a larger parcel of property subject to a subdivision map. That map showed certain designated lots with adjacent Streets and Alleys. The Streets and Alleys were *not* designated as separate or strip lots. The Streets and Alleys were subsequently vacated. Given these facts, the statutory presumption, and the public policies against the creation of strip lots, the adjacent Streets and Alleys were part of the legal lots which the Snakewall owner could convey pursuant to the Subdivision Map. *Anderson*, 190 Cal. App. 3d at 1132.[14] When the Seller sold the Lots to Buyers in 1988 but

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[14] In addition, contrary to Smith's assertion, these presumptions can be applied to events which occurred in the past, as the Courts have done in numerous cases. *E.g. Anderson*, 190 Cal. App. 3d at 1132 (presumption applied in 1921 case to events occurring a decade and more before); *Baker*, 190 Cal. App. 3d at 1132 (presumption applied in 1987 case to abandonment which occurred in 1913).

excluded the Streets and Alleys, he undertook an illegal subdivision.

The Seller attempts to obfuscate this simple result by blurring the 1910 Subdivision Map and his 1988 transfer to the Buyers. He argues that the statutory presumptions do not apply because the 1988 transfer expressly excepted the Streets and Alleys, thus falling into the exception to the statutory presumption applicable where there are express deed provisions to the contrary. This is ridiculous.

The issue in this case is the boundaries of Lots H, I and J before the 1988 transfer, which are defined by the 1910 Subdivision Map. The statutory presumption is applied to determine the boundaries of the Lots under this map, which defines what the Seller owned before he sold to the Buyers and what he had to transfer to the Buyers to avoid an improper subdivision under the Map Act.

There is no express reservation in the deeds to the Seller and his predecessors that would contradict the statutory presumption and the 1910 Map.

The deeds to the Seller and his predecessor conveyed:

> Lots G, H, I, J, K, L, M, N, O, and S, *together with* the 10.00 and 15.00 foot alleys *adjoining* said lots as closed to public use, *all in* Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, *according to Map No. 1285*, filed in the Office of County Recorder of San Diego County.

(Seller's Lodged Exhibit N-A, p. 1; Seller's Lodged Exhibit 21, p. 1.)

This deed language does not in any way express an intent to overcome the presumption as to ownership of the Streets and Alleys in the adjoining lots. To the contrary, the lots in the Snakewall Property were conveyed "together with" the streets and alleys, and "according to" the Subdivision Map. While the lots each had a letter designation, the Streets and Alleys did not. The lots H, I and J which the Seller and his predecessor obtained in 1977 and 1972 as designated on the Subdivision Map already included portions of the adjacent Streets and Alleys. Under the Map Act, the Seller (and his predecessors) could not legally carve out those portions of the lots in 1988 and retain them.

The presumption that the lots which the Seller could legally sell under the Act included portions of the adjoining streets and alleys thus arose long *before* the Seller's sale of the Lots to the Buyers. It arose when the Subdivision Map was first approved, and carried over after the vacation in 1925. *Anderson*, 185 Cal. at 393 (where lots on a map are shown as bounded by an abandoned street, "the fee in the half of the street upon which the lot abuts *is in fact part of the lot*") (emphasis added)); *Baker*, 190 Cal. App. 3d at 1132 (where dedicated street in subdivision was abandoned by county, half of the street "became part of" the lots on either side); *Safwenberg*, 50 Cal. App. 3d at 307 (street owned by abutting landowners both before *and* after abandonment of street by local agency). The deeds to Buyers came *after* that presumption had already attached to define the Lots as including the Streets and Alleys for purposes of subdivision.

The Seller concedes that the *Baker* court properly applied the presumption to a predecessor's deed to a common owner of disputed lots. That deed conveyed lots to a John Maddock by reference to a recorded map which showed an adjacent street. There was a similar conveyance in the present action. The Seller and his predecessor each received deeds describing the a group of lots with the adjoining streets and alleys by reference to the 1910 Subdivision Map, which did not show the Streets and Alleys as separate lots. Thus, under the Seller's own reasoning, he and his predecessor received lots which included the adjacent Streets and Alleys. The Seller clearly failed to convey those complete lots in this case.

The Seller quibbles with the trial court's reasoning as to the effect of the vacation of the Streets and Alleys on the presumption as it is applied to the present case. While the Courts of Appeal in *Baker* and *Safwenberg* apply slightly different reasoning as to the effect of an abandonment of roadways by a governmental authority, they both come to the same conclusion. As the *Baker* court stated:

> *Thus, when the portion of Bravo Street bisecting the lots owned by John Maddock was abandoned in 1913,* Mr. Maddock became entitled to possess and occupy that strip. *The north half of Bravo Street became part of lots 168 through 171, and the south half of Bravo Street became part of lots 172 through 175 even though the entire parcel had a common owner.*

190 Cal. App. 3d at 1132 (emphasis added). *See also Anderson,* 185 Cal. at 393 (where lots on a map are bounded by abandoned street, "the fee in the half of the street upon

which the lot abuts *is in fact part of the lot*") (emphasis added).

The Court in *Safwenberg* put it this way:

> The abutting fee owners did not acquire such fee title to the underlying land when the street was vacated since such fee title *was always vested in the abutting owner.* The vacation of Ash Street merely terminated the surface easement for highway purposes and vested surface rights in the abutting land owners.

50 Cal. App. 3d at 308 (emphasis added).

Thus, regardless of the reasoning followed, both the *Baker* and *Safwenberg* Courts concluded that lots created by a subdivision map which border roadways abandoned by a public entity extend to the center of the roadway. "The policy behind the law is to avoid ownership in land in strips and gores by attaching the underlying fees of streets, *both active and abandoned,* to the adjoining lots." *Safwenberg,* 50 Cal. App. 3d at 306 (emphasis added).

In the present action, whether this occurred when the Subdivision Map was approved in 1910 or as a result of the vacation in 1925, the presumption that Lots H, I and J extended to the center of the adjoining alleys attached long before the Seller's conveyance to the Buyers in 1988. In fact, the Seller's attempt to defeat that presumption in the 1988 grants is what *caused* the improper subdivision.

The Seller does not dispute that if the deeds to the Buyers had merely referenced the Subdivision Map and been silent as to the adjacent alleys, the Buyers would have received lots that included those Streets and Alleys under *Anderson, Baker,* and *Safwenberg.* That is because the

lots *as they existed prior to the conveyance to the Buyers* included the adjacent alleys. The Seller himself recognized this, as he found it necessary to express his "contrary intent" in his deeds to the Buyers. Thus, the very deeds upon which the Seller relies to excuse his actions actually prove his violation of the Map Act.

The Seller cites several cases in which the Courts of Appeal have held that the presumption of ownership to the center of the streets was rebutted by evidence of contrary intent in a deed. *See, e.g., Speer v. Blasker,* 195 Cal. App. 2d 155 (1961); *City of Redlands v. Nickerson's,* 188 Cal. App. 2d 118 (1961); *Murray,* 250 Cal. App. 2d at 248. However, those cases are of no aid to the Seller herein because he did not express his "contrary intent" in a deed until *after* the presumption had *already attached* to define the Lots as including the adjacent Streets and Alleys. In addition, none of those cases addressed Map Act issues. An owner is precluded from exercising his common law ability to sell his property as he chooses when the exercise of that common law right effects a subdivision under the Map Act. The Seller's exclusion of the Streets and Alleys effectuated a subdivision, and his failure to obtain a new map or otherwise comply with the Map Act's requirements constituted a violation of that Act.

3. THE TAX ASSESSOR'S RECORDS DO NOT DEMONSTRATE THAT THE LOTS EXCLUDED THE STREETS AND ALLEYS

The Seller argues that his actions did not constitute a "subdivision" as that term is defined in Government Code Section 66424. (Seller's Opening Brief, pp. 11-14 and

16-27.) Section 66424 defines a subdivision as "division by any subdivider of any improved or unimproved land shown on the latest equalized county assessment roll as a unit, or as contiguous units . . . " The Seller asserts that the assessor's records show that Lots H, I and J as created pursuant to the 1910 Subdivision Map did not include the adjacent streets and alleys, and that therefore he did not effectuate a "subdivision" when he sold lots without those Streets and Alleys. He is wrong on both points.

First of all, Seller attempts to rely on a recent assessor's map to support his argument. However, the determination which must be made here is what the boundaries of the Lots were *before* the Seller's transfer to the Buyers. The only assessor's map relevant to that inquiry is the map which existed prior to that 1988 transfer. This map, consistent with the Subdivision Map, does *not* show the Streets and Alleys as a separately designated lot or lots. Instead, it shows a series of broken lines delineating the Streets and Alleys. (CT Vol. VIII at 1735.) The pertinent assessor's records thus provide absolutely no support for the Seller's argument that the Streets and Alleys were not part of the adjoining lots prior to the transfer to the Buyers.

In any event, tax assessor records do not establish legal lot lines, and may not be relied upon for determining compliance with the Map Act. 59 Cal. Op. Att'y Gen. 581 (1976); 62 Cal. Op. Att'y Gen. 147 (1979).

> Reference [in section 66424 of the Act] to the "latest county assessment roll" provides a simple measure for determining whether title to a

> particular parcel of property has been transferred from one owner to the next. Such reference was *not* intended to permit the actions of the County Assessor to, in effect, negate the filing of a map under the Map Act.

59 Cal. Op. at 583.

The rationale for this rule is obvious:

> If the administrative action of an assessor could be relied upon by a landowner in the circumstances under consideration, it could be argued that a proper "division" by the owner and its attendant submission of a map and approval by the proper local agency would be unnecessary to sell one of the areas given a separate parcel number by the assessor. Such an occurrence, however, would remove local planning control over the development of the property and thereby frustrate the very purposes of the Act.

62 Cal. Op. at 149.

The county assessment roll does not show lot lines; it merely references parcels. The assessor's parcel maps do show lot lines. However:

> The function and purpose of the County Assessor is to raise revenue and not to regulate the division of land. . . . A County Assessor will quite often combine or renumber parcels for valid reasons entirely separate from the purposes of the Subdivision Map Act.

59 Cal. Op. at 583 (citations omitted).

The two attorney general opinions described above and relied on by the trial court herein illustrate actual

situations where in fact the assessor's maps did not accurately reflect proper "legal lots" under the Act. In one case, the assessor's records showed two separate parcels when the subdivision map showed only one. 62 Cal. Op. at 149. In the other case, the assessor's records showed only one lot where the subdivision map showed three. 59 Cal. Op. at 583. In both cases, the subdivision map properly controlled the Map Act determination over the assessor's records *Id.*

Similarly, in the present action, several recent assessor's maps show various separate parcels made up of portions of the Streets and Alleys not shown as separate lots on the 1910 Subdivision Map. (CT Vol. VIII at 1736-1738.) These examples conclusively demonstrate that as a practical matter, and particularly in the present action, assessors' records cannot be relied on to define the boundaries of lots which may properly be sold under the Map Act.

In fact, the assessor's maps herein demonstrate the danger in accepting the Seller's argument. Those maps show the Streets and Alleys being split, re-split, and merged into lots in all sorts of ways not shown on the 1910 Subdivision Map. (CT Vol. VIII at 1736-1738.) For example, an assessor's map effective in 1991 shows the addition of three *new* strip lots (parcels numbered 31, 32, and 33), consisting of portions of the Streets and Alleys. (CT Vol. VIII at 1737.) These partial lots were *not* shown on the approved 1910 Subdivision Map. (Seller's Lodged Exhibit N-B.)

The Seller's literal reading of Section 66424 would "destroy the purpose and intent of the Map Act requirements. It is clear that this was not the result intended by the Legislature." 59 Cal. Op. at 583.[15] Given the lack of a separate lot number for the Streets and Alleys on the 1910 Subdivision Map, the rules and public policy regarding ownership to the center of adjoining roadways, and the policy of orderly development behind the Map Act, the lots which the Seller could legally convey to the Buyers in compliance with the Map Act *included* the adjacent streets and alleys. The trial court correctly determined that his failure to convey those entire lots constituted an illegal subdivision.

4. THE SELLER'S OWN ACTIONS CONFIRM THAT UNDER THE 1910 SUBDIVISION MAP AND THE STATUTORY PRESUMPTIONS THE LOTS INCLUDED THE ADJACENT STREETS AND ALLEYS

Finally, the Seller's argument that the exception to the statutory presumption applies to him because he expressly excepted out the Streets and Alleys in his conveyance to Buyers itself confirms the Map Act violation. The Seller's argument simply proves too much: if the Streets and Alleys had not been part of the Lots prior to the transfer, there would have been no need for the Seller

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[15] Seller devotes considerable discussion to the definition of the word "divide." He again misses the point. The issue is what the boundaries of the lots shown on the 1910 Subdivision Map were. Once that issue is decided, determining that there was a division of property in this case is easy.

to expressly reserve title to that portion of the property in making his sale to the Buyers. In other words, the very exception of the Streets and Alleys from the sale by the Seller was an admission that they *were* part of the legal lots which the Seller was transferring.

Moreover, the Seller's general treatment of the Streets and Alleys portion of the subdivision and of other lots in the Snakewall subdivision graphically demonstrates his complete disregard for the 1910 Subdivision Map and the restrictions of the Map Act, as well as the danger in accepting his fatally flawed argument. Recent assessor's maps show the Streets and Alleys in the Snakewall subdivision split into various portions, with some portions being included in adjacent lots and others not. (CT Vol VIII at 1735-1738.) The Seller apparently believes he can carve up and distribute portions of the Streets and Alleys as he pleases. He said as much in oral argument before the trial court, characterizing the streets as "separate strips of land," and indicating his belief that he could attach them to whatever lot he wished. (E.g. RT Vol. IX at 415-416; 443-444.) If allowed, this type of free-wheeling subdivision would completely subvert the Map Act's goal of rational, controlled development. *Pratt*, 229 Cal. App. 2d at 606 (Map Act designed "to regulate and control the design and improvement of subdivisions").

5. SELLER'S REMAINING ARGUMENTS THAT THE PRESUMPTIONS OF CIVIL CODE SECTIONS 831 AND 1112 DO NOT APPLY ALSO FAIL

a. The Statutory Presumptions Do Not Apply Just to Quiet Title Actions

Seller argues without foundation that Civil Code Sections 831 and 1112 for some unspecified reason apply

only to quiet title actions. (Seller's Opening Brief, pp. 31-35 and 3744.) The Seller blithely states that "every case in the annotations to Sections 831 and 112 are Quiet Title actions, [and] by their very nature Sections 831 and 1112 could *only* apply in a Quiet Title Action." (*Id.*, pp. 32-33 (emphasis added).) The first part of that statement is false, and the second part nonsensical.

Sections 831 and 1112 have been applied to determine boundaries of property in various types of actions, not just quiet title actions. *E.g., Taylor v. Continental Southern Corp.*, 104 Cal. App. 2d 425, 233 P. 2d 577, 582 (1951) (Section 831 presumption applied in action to require defendant to account to plaintiff for her proportionate interest in proceeds under oil and gas lease); *Porter v. City of Los Angeles*, 182 Cal. 515, 189 P. 105, 106 (1920) (Section 831 presumption applied in trespass action). The language of the statutes does not expressly limit their application, nor is there any logical reason not to apply the presumption where assistance is needed in constructing a document or determining the boundaries of property. Indeed, the purpose of a quiet title action *is* to determine the boundaries of property – the precise issue underlying the validity of the Map Act compliance here.

The Map Act prohibits an owner from selling less of a parcel than he owns *at the time of the sale being challenged*. In order to determine whether the owner has sold less than the entire lot, it is necessary to determine the lot's boundaries. Sections 831 and 1112 provide rules of construction to make that determination.

In the present action, these Sections apply to interpret the 1910 Subdivision Map to determine what the

boundaries were of the lots purchased by the Seller and ultimately sold to the Buyers. As set forth above, the California Supreme Court and Courts of Appeal have applied these sections numerous times to hold that lots subject to subdivision maps include half of adjacent streets or alleys. *See, e.g., Anderson,* 185 Cal. at 393; *Baker v. Ramirez,* 190 Cal. App. 3d 1123, 1132 (1987); *Safwenberg,* 50 Cal. App. 3d at 308 (title in abandoned street is "in the abutting land owners as a matter of law"); *Neff v. Ernst,* 48 Cal. 2d 628, 635 (1957) (following *Anderson* rule). The trial court properly applied those rules to determine the boundaries of the lots which the Seller in this case could convey pursuant to the Subdivision Map.

b. The Presumptions Are Properly Applied to the Subdivision Map

The Seller also argues that the presumptions of Sections 831 and 1112 cannot be applied to interpret the 1910 Subdivision Map, but can only be used to interpret his deed to the Buyers. Section 1112 does refer to "a transfer of land" and "the grant." Section 831 by its terms is not so limited, however. It merely states that:

> An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown.

There is no reference in Section 831 to conveyances or grants. It is a general rule applicable in any appropriate context, including to interpret a subdivision map. In each of *Anderson, Baker,* and *Safwenberg,* the Courts of Appeal applied the statutory presumption of ownership to the middle of the street to deeds which merely referenced

subdivision maps, concluding that the abutting landowners held title to the adjoining streets shown on the maps.

The Seller purports to quote language from a treatise and a case to the effect that the presumptions of Sections 831 and 1112 apply only when there is a conveyance, and that conveyance designates the street or alley as a monument or boundary. (Seller's Opening Brief, p. 39 (referencing 3 *California Real Estate Law and Practice*, Augustine and Zarrow, Section 81.13, p. 81-41 (1968) and *Millyard v. Faus*, 268 Cal. App. 2d 76, 83 (1968).) Neither of these authorities states that the presumption can never be applied to interpret a subdivision map. The presumption was clearly applied to interpret the subdivision maps in *Anderson*, *Baker*, and *Safwenberg*. It is properly applied whenever there is a question of ownership of streets, whether in a quiet title or Subdivision Map Act, or any other context.

B. THE SUBDIVISION MAP ACT RESTRICTS DIVISIONS OF PROPERTY AND MAKES SELLERS LIABLE FOR VIOLATIONS OF ITS PROVISIONS

1. WHERE THERE IS AN ILLEGAL SUBDIVISION. THE BUYER IS ENTITLED TO RESCIND THE TRANSFER AND RECOVER DAMAGES

As discussed above, for numerous reasons the trial court properly determined that the Seller violated the Map Act when he transferred parts of Lots H, I, and J to the Buyers, while retaining for himself the adjacent

Streets and Alleys. Upon this determination, application of the Map Act is straightforward.

Subdivisions of property in California must be made pursuant to a subdivision map, with a few exceptions inapplicable here. Cal. Gov't Code § 66499.30. Basically, a "subdivision" occurs under the Act when an owner splits off and conveys part of a parcel while retaining a portion of that parcel, without an approved subdivision map or other Map Act approvals. Cal. Gov't Code § 66424.

The Act makes sellers strictly liable for improper subdivisions by giving buyers the absolute right to rescind purchases which violate its provisions, and to recover damages. As to rescission, the Act states:

> Any deed of conveyance, sale or contract to sell real property which has been divided, or which has resulted from a division, in violation of the [Act] is *voidable at the sole option of the grantee,* buyer or person contracting to purchase . . .

Cal. Gov't. Code § 66499.32(a) (emphasis added).

The Act also provides for recovery of damages resulting from a violation:

> *Any grantee,* or his successor in interest, *of real property which has been divided, or which has resulted from a division, in violation of the [Act]* may, within one year of the date of discovery of such violation, bring an action in the superior court to *recover any damages he has suffered* by reason of such division of property. . . .

Cal. Gov't Code § 66499.32(b) (emphasis added).

These provisions reflect the legislative intent to protect purchasers of property from the sale of legally flawed

parcels. *See, e.g., Bright v. Board of Supervisors of County of San Diego*, 66 Cal. App. 3d 191, 195-96 (1977) (the legislative purpose of the Map Act "is to protect the individual transferee as well as the public at large"); *Pratt*, 229 Cal. App. 2d at 606 (Map Act is intended to protect purchasers). The Buyers in the present case are within the class of protected purchasers entitled to rescind the sale and collect damages under the Map Act, as the trial court properly found.

As set forth above, the Lots H, I and J which existed prior to the Seller's conveyance to the Buyers included the adjacent Streets and Alleys. It is undisputed that the Seller specifically excepted those Streets and Alleys from his conveyance to the Buyers. The trial court therefore properly determined that the Seller violated the Subdivision Map Act.[16]

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[16] In any event, the City's determination of illegality conclusively entitles Buyers to relief under the rescission and damages provisions of the statute. Local agencies must make determinations of legality under the Subdivision Map Act. Cal. Gov't. Code § 66499.35(a). The courts traditionally defer to the interpretation of statutes by the agencies charged with the responsibility for doing so. *E.g., Organization of Deputy Sheriffs, Inc. v. County of San Mateo*, 48 Cal. App. 3d 331 (1975) (Court deferred to county Civil Service Commission's interpretation of union statute). In addition, local agencies may refuse to grant permits for lots which they determine were divided in violation of the Act. Cal. Gov't. Code § 66499.34. Such a determination carries with it all of the disabilities of owning an illegal lot. That is exactly the situation in the present action, where the City's determination halted all development and transfer of the property. Thus, the determination of lot illegality which supports a strict liability-based rescission at Plaintiff's sole option, also establishes a basis for recovery under the Act, entitling the purchaser to damages whenever the purchaser suffers harm.

2. THE STATUTORY EXCEPTIONS TO THE MAP ACT RELIED ON BY SELLER DO NOT APPLY TO THIS CASE

The Seller argues that his conveyance to Buyers complied with Sections 66499.32 and 66499.57 of the Act. (Seller's Opening Brief, pp. 27-31.) Section 66499.32 allows sellers to convey property "identified in a recorded final map from and after the date of recording." Section 66499.57 of the Act similarly allows sellers to comply with the Act by identifying the property simply by referencing an approved subdivision map.

These provisions facilitate the sale of land already properly subdivided. Neither provision allows *further* subdivisions without *further compliance*. While the Seller's deeds did reference the 1910 Subdivision Map and identify the Lots being conveyed as lots H, I, and J on that map, the Seller completely ignores the fact that these deeds *went on* to "specifically exclud[e]" from that transfer the adjacent Streets and Alleys. (CT Vol. I at 57-71.) The Seller thus split off a portion of the lots shown on that map. It is no different than if he had described the lot as "Lot H as shown on the Subdivision Map," but then excluded "the eastern half." He further subdivided his property beyond what had been approved under the Map Act. The Seller therefore cannot rely on the deeds' references to the 1910 Subdivision Map to avoid liability under the Map Act. The descriptions in the deeds did not excuse him from further compliance with the Map Act. As Judge Prager stated in ruling against the Seller in the Mandamus Action: "a lot split occurring long after the final recording of the maps would defeat the presumption

of validity established by these maps." (Exhibit J to Judgment on Pleadings Opposition at p. 12 (Ruling Transcript).)

Judge Howatt and Judge Prager both correctly rejected the Seller's argument under Section 66499.32. It would be completely against the purpose and policies of the Map Act to allow a grantor to reference a subdivision map, split out part of his property, and then argue that his mere reference to the map cancels out the subdivision. As Judge Howatt stated, such an interpretation "would be antithetical to the whole process and purpose of the Act and would serve only to derogate from those purposes . . . " (RT Vol. V at 208.)

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and Robin S. Emsley

SUPREME COURT OF THE STATE OF CALIFORNIA

Case Name: *Roulette et al. v. Smith*
Case Number: S033948

PROOF OF SERVICE BY MAIL

I, Annadele M. d'Ecclesiis, declare: That I am, and was at the time of service of the papers herein referred to, over the age of 18, not a party to the within action, and employed in the County of San Diego, California, within

which county the subject mailing occurred. My business address is 7855 Ivanhoe Avenue, Suite 420, La Jolla, CA 92037.

I served the following document:

ANSWER TO PETITION FOR REVIEW

by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

James E. Smith
2100 Gatun Street
Del Mar, CA 92014
(in pro per)

Clerk of the Superior Court
North County Branch
325 S. Melrose Drive
Vista, CA 92083
(1 copy)

Mark A. Potter, Esq.
5090 Shoreham Place, Suite 101
San Diego, CA 92122
(for City of Del Mar) (1 copy)

Clerk of the Fourth District
Court of Appeal
750 B Street, Suite 500
San Diego, CA 92101
(1 copy)

I then sealed each envelope and, with the postage thereon fully prepaid, deposited each in the United States mail at La Jolla, California, on August 2, 1993

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: August 2, 1993

/s/ Annadele M. d'Ecclesiis
Annadele M. d'Ecclesiis

APPENDIX D

CIVIL NO. S033948

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Roulette, The Emsley's, et al Plaintiffs and Respondents, vs. James E. Smith, Defendant and Appellant.	CIVIL NO. S033948 (4th DCA, Div. One D017058) (No. Co. Sup. Ct. N49451)
(See complete title page at page iv)	

REPLY TO ANSWER TO PETITION FOR REVIEW

On Appeal From the Judgment of the Superior Court
of the State of California, San Diego County
Honorables Ronald L. Johnson and William J. Howatt, Jr.

James E. Smith
2100 Gatun Street
Del Mar, California 92014
Phone 619-755-7794
Propria Persona for Appellant

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PROOF OF FILING (PRIORITY MAIL) AND SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, self-employed in the County of San Diego, State of California, in which County the within mentioned mailing occurred, and not a party to the subject matter. My business address is 993-F Lomas Santa Fe Drive, Solana Beach, California 92075. I filed (priority mail) and served the within: REPLY TO ANSWER TO PETITION FOR REVIEW (a true and correct copy of which is attached) by United States mail addressed as follows:

California Supreme Court
South Tower-Eighth Floor
303 Second Street
San Francisco, CA 94107
(Original plus 13 copies)

Clerk of the Superior Court
North County Branch –
Dept. M
325 So. Melrose Drive
Vista, CA 92083
(1 copy)

Clerk of the 4th DCA
Court of Appeal-
Division One
Fourth Appellate District
750 "B" Street, Suite 500
San Diego, CA 92101
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Mark A. Potter, Esq.
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The documents were then placed in envelopes, which were sealed, and with the postage thereon fully prepaid

and deposited with the United States Postal Service for mailing by me on August 6, 1993 at Solana Beach, California, following ordinary business practices.

There is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 6, 1993 in San Diego, California.

/s/ Barbara L. Dennis
Barbara L. Dennis

James E. Smith, Propria Persona
2100 Gatun Street
Del Mar, CA 92014
(619) 755-7794

For Petitioner, Appellant, Defendant
and Cross-Complainant James E. Smith

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Respondents/Plaintiffs/ Appellees, v. JAMES E. SMITH; and DOES 1 through 20, inclusive, Petitioner/Defendant/ Appellant,	CASE NO. S033948 (4TH DCA, Div. One D017058) (NO. CO. Sup.Ct. N49451)
JAMES E. SMITH, Petitioner/Cross-Complainant/ Appellant, v. MARGARET L. ROULETTE, individually; MARGARET L. ROULETTE as trustee of Trust "B" under that certain Declaration of Trust dated November 29, 1971; S. SCOTT EMSLEY, individually; S. SCOTT EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; ROBIN S. EMSLEY, individually; ROBIN S. EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; CITY OF DEL MAR; CITY COUNCIL OF DEL MAR; and ROES [sic] 1 through 50, inclusive. Respondents/Cross-Defendants/Appellees.	

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I

RESPONDENTS' OPPOSITION BRIEF[1] GRAPHICALLY ILLUSTRATES THE NEED FOR REVIEW OF THIS CASE

Respondents incorrectly characterize the thrust of Petitioner's contentions in the "Request for Review" in this Court. Petitioner most assuredly does argue that there is a conflict between the Courts of Appeal on the issues raised in this action.

For example, Respondents contend that the case of *Earl v. Dutour* (1919) 181 Cal. 58 "is inapplicable to the present action". Nothing could be more erroneous.

Respondents, as well as the Court of Appeal, have consistently relied upon the case of *Baker v. Ramirez* (1987) 190 Cal. App. 3d 1123, for the proposition that Civil Code § 1112 "applied to make the center line of Bravo Street the north line of said lots." Id. at 1132. The case of *Earl v. Dutour,* supra, was cited as authority for that statement (i.e., no "contrary intent" was present in *Baker*), due to the fact that the streets in *Baker* as in the present action, were vacated. It's incredulous that Respondents would now contend that *Dutour* is inapplicable; and even more incredulous that Respondents would contend that *Baker* distinguishes *Earl v. Dutour,* (ROB Fn 1, p 4).

Nevertheless, *Baker* along with *Allan v. City and Co. of San Francisco* (1936) 7 Cal. 2d 642; and *Anderson v. Citizens Sav. and Trust Co.* (1921) 185 Cal. 386; and a plethora of

[1] Hereinafter ROB.

other cases, demonstrate the inconsistency with the Court of Appeal's holding in the instant case.

To begin with, each of those cases is a quiet title action, unlike the present action. In each case, upon subdivision of the property in question, the subject lots were bounded by streets and depicted as such on the Final Map of the subdivision. Similarly, in the case at bar lots H, I, and J, Final Map No. 1285 were and remain depicted as bounded by streets/alleys. The inconsistency arises as a result of this Court of Appeal's belief that at the time of the filing of the original subdivision map "lots H, I and J included half of the adjacent alley," (Opinion[2], p 11). This is not the law of this State.

The presumptions of §§ 831 and 1112 of the Civil Code can only be applied to a conveyance of property *never* to the act of subdividing the property. *Where no contrary intent clearly appears from the deed;*

> "There would seem to be no reason for not applying as between them the rule that a *conveyance* of a lot bounded by a street carries the fee to the center of the street as a part of the lot." [§ 1112 Civ. Code] *Anderson v. Citizens Sav. Etc. Co.* (1921) 185 Cal. 386, 393. Emphasis added.
>
> "The respondent contends that *by these conveyances* the said Thomas Hayes *conveyed* not only the land specifically described therein by metes and bounds and by lots and blocks, but also the land to the center of the streets in front of said respective parcels of land." *Allan v. City and Co. of San Francisco* (1936) 7 Cal. 2d 642, 645. (*Allan*

---

[2] Hereinafter Op.

was also a § 1112 Civ. Code case, id. at 646). Emphasis added.

"Where property is sold by reference to a recorded map, the grantee *generally* takes to the center of the street shown on the map as bounding the property." [§ 1112 Civ. Code] *Baker v. Ramirez* (1987) 190 Cal. App. 3d 1123, 1132. Emphasis added.

In none of these cases nor any other case dealing with the presumptions of Civil Code §§ 831 or 1112 has a Court of Appeal applied the presumptions to the act of subdividing property.

Guidance should be given to the Courts of this State regarding the Map Acts mandatory (i.e., shall be), prohibition of the utilization of Civil Code §§ 831 and 1112 to change the lot lines on Final Map lots. [See Govt. Code §§ 66412.6(a)(b), 66499.21, 66499.32 next to the last paragraph, and 66499.57 (among others)].

II

THE LOTS BOUNDED BY STREETS ARE THE ONLY LOTS SUBJECT TO THE STRICTURES OF THE SUBDIVISION MAP ACT

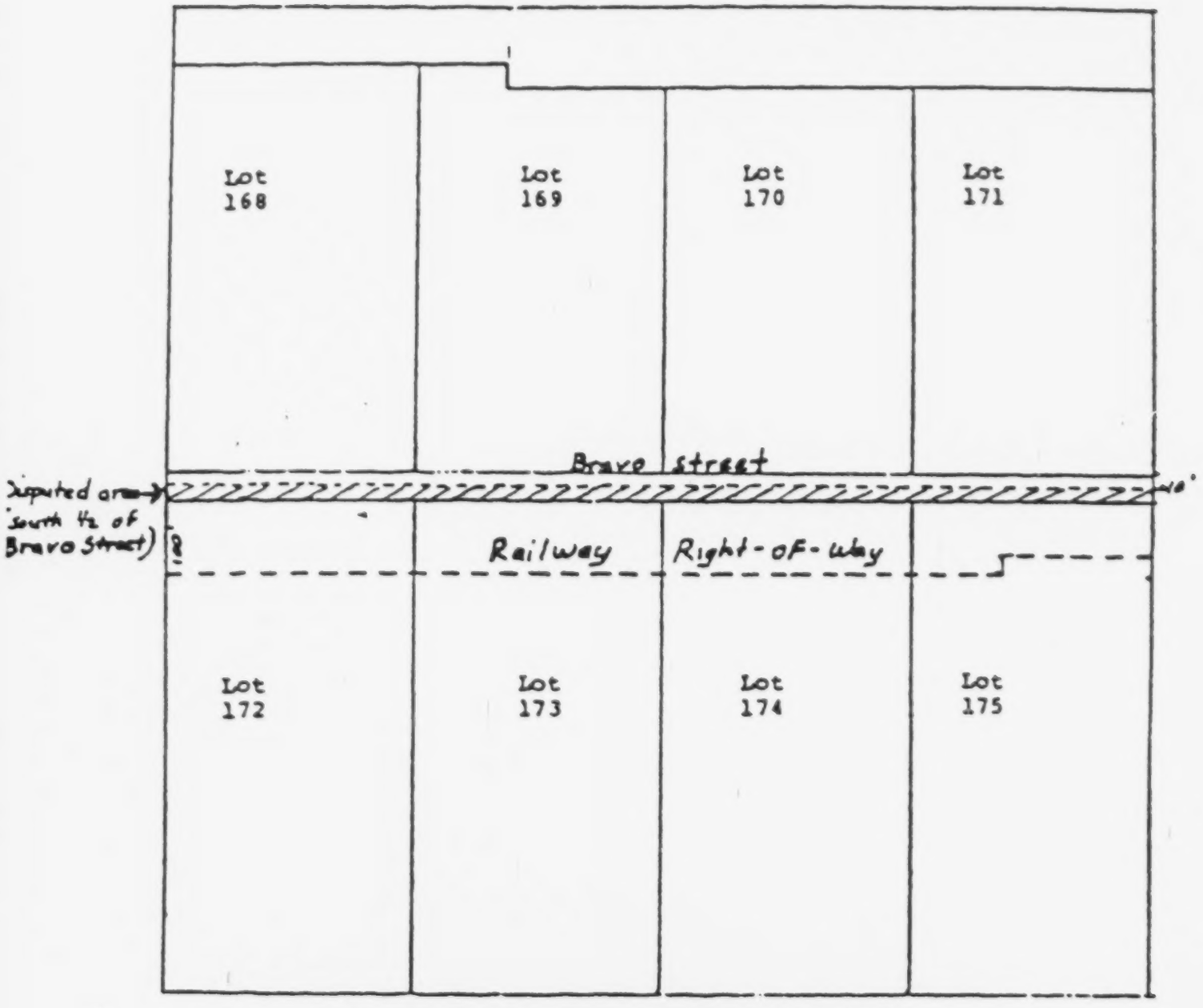
Once again, utilizing Respondents' case authority, Petitioner will show that the "lot" interpreted as extending to the center of the adjacent street pursuant to §§ 831 or 1112 of the Civil Code is not the lot which can be subject to the mandates of the Subdivision Map Act.

"This dispute concerns a parcel of property comprising eight lots, numbered 168 through 175, of the Woodlake Tract of Tulare County.

> This parcel is divided into lots 168 through 171 on the north and lots 172 through 175 on the south, separated by a 40 foot wide dedicated public road shown on the subdivision map as 'Bravo Street'. [Bravo Street was abandoned in 1913]." *Baker v. Ramirez*, supra, (1987) 190 Cal. App. 3d 1123, 1130.

The *Baker* case is extremely helpful in illustrating Petitioner's contention that the lots depicted on the map are the ones subject to the Subdivision Map Act. At the end of the *Baker* case at 190 Cal. App. 3d 1123 at 1140, as an Appendix, a copy of the lots as depicted on the subdivision map is provided. For convenience to all parties *Baker*, supra, p. 1140 is contained herein at p 5.

Baker v. Ramirez, 190 Cal.App.3d 1123 at 1140 (1987)



Map, NW1/4 of NE1/4 of Sec. 36, T 17 S, R 26 W

Lots 168-175 of Woodlake, per map recorded in Book 10, of Maps, pp. 27-28, O.R. Tulare County, Calif.

Observing p 5, supra, the configurations of lots 168 through 171, we see that they front on Bravo Street. None of the boundaries extend to the center line of Bravo Street. Similarly in the case at bar the trial court as well as the Court of Appeal both agreed that Final Map No. 1285 depicting lots H, I, and J showed them as being separate from the adjacent street. (See Petition for Review p 13, LL 15-18; and Court of Appeal Op p 6, Fn 3).

It is precisely these lots, i.e., 168-171, just as it is precisely lots H, I, and J as they are depicted as fronting on a streets/alleys which are the lots subject to the Subdivision Map Act.

Under Respondents' theory, as well as the Court of Appeal, we are asked to envision the boundary lot lines as extending to the center of the street so that when a grantor sells, for instance, lot 169 and manifests an intention in the deed that the street portion shall not pass [contrary intent], this hypothetical lot has now been divided in violation of the Subdivision Map Act.

The Court of Appeal in the instant case has held that this manifestation of contrary intent (as provided for in Civil Code §§ 831 and 1112), "thus subdivided the lots, creating new units of land by dividing the alley portions from the adjacent lots", (Op p 11). In viewing the map provided herein, p 5, supra, from the *Baker* case at 1140; and, for the moment, visualize lots H, I, and J in the stead of lots 168, 169, and 170, it is submitted that there can be no subdivision of those lots as they are depicted on the Final Map No. 1285 (Exhibit 1 in Evidence), by the manifestation in the deed of conveyance of an intent that the

street/alley portions not pass with the conveyance. It is legally impossible.

Recently, in the case of *Stell v. Jay Hales Development Co.* [Dec. 1992] 11 Cal. App. 4th 1214, the Second District Court of Appeals, Division Five, dealt with the issue of parcel size, specifically lot 12. Additionally, lot 12 fronted on Georgian Road, Id. at 1219-20. The dimensions of lot 12, as it was shown fronting on Georgian Road, were depicted on the 1946 subdivision tract map of tract 13397. Id. at 1222.

Clearly, if we are to accept the Fourth District's (Division One), holding that at the time of subdivision the lots adjacent to the road really extend to the center of the road, then the parcel size in *Stell*, supra, would have to be re-calculated.

similarly [sic], in *Allan v. City & Co. of San Francisco*, supra, there would be no dispute at all if the holding in the case at bar had been followed, to wit:

> "Three of these deeds *conveyed* specific parcels of land fronting respectively upon the parcels of land here in dispute." Id. at 645. Emphasis added.

The land therein in dispute was the street portions. However, accepting this District's (4th) holding that from the time of subdivision the lots extend to the center of the adjoining street, there would be no land in dispute.

The foregoing has served to illustrate that there is obviously inconsistent holdings within the appeals courts with regard to the issues presented in this action.

Reviewing once again the subdivision map from p 1140 of *Baker*, p 5 supra, ask the question; how could lots 168, 169, and 170 be improperly subdivided by the grantor expressing a "contrary interest" in the conveyance deed with regard to the passage of the fee in the adjacent street/alleys. The answer to that question should suffice as a sound reason for the granting of review or summarily reversal in this case.

III

THE SEPARATION OF POWERS DOCTRINE IS TIMELY AND APPLICABLE

Throughout this litigation Petitioner has contended that §§ 831 and 1112 of the Civil Code cannot be utilized to create an imaginary "lot" subject to the provisions of the Subdivision Map act. Although perhaps inartfully stated, the clear implication is that the Superior Court was without power to do just that.

Superior Courts cannot establish the boundary lines of lots within a subdivision unless it is done in compliance with the Map Act procedures. (Govt. Code § 66499.21 through 66499.29).

Respondents seem to feel that the courts below were merely "declaring the law and determining the rights of the parties under it", (ROB p 5). Petitioner agrees that the declaration and determination of the rights of the parties took place but only after the court exceeded its power and proceeded to determine the location of property lines different than as depicted on Final Subdivision Map No. 1285.

This presents an added reason for granting review or summarily reversal of this case so that the courts of this state will have guidance with regard to their power to establish boundary lines in a fashion not in conformity with the Subdivision Map Act; i.e., by way of declaring lots pursuant to §§ 831 and 1112 of the Civil Code as extending to the center of adjoining streets/alleys.

IV

CONCLUSION

At first glance, the issues in this case as presented by Respondents resemble more of a Gordian Knot than a simple legal principle.

The principles set out in this action are apparently lacking in conformity as far as the opinions of the various districts are concerned.

A review of the map set out at p 1140 of *Baker*, supra p 5, would seem to answer and solve many of the perceived problems or questions concerning the issues presented in this action.

That resolution, however, has not been forthcoming for unknown reasons.

This Court should grant review of this case to make those reasons known and settle these issues so as to prevent future needless litigation as was occasioned in the case at bar. This can only be accomplished through

uniformity of decisions and this is the only Court left in California to do that.

Review or summarily reversal is requested.

Respectfully submitted,

Dated: August 6, 1993

/s/ James E. Smith @ 1340
James E. Smith
Propria Peronsa for
Appellant

APPENDIX E

CASE NO. D017058

COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

ROULETTE, DEL MAR, ETAL. Respondents/Plaintiffs/ Cross-Defendants/Appellees v. JAMES E. SMITH, Petitioner/Defendant/ Cross-Complainant/Appellant. (See complete title page at page v)	CASE NO. D017058 (NORTH COUNTY SUPERIOR COURT CASE NO. N49451)

Appeal from the Superior Court of San Diego County
Honorables Ronald L. Johnson and
William J. Howatt, Jr.

PETITION FOR REHEARING

James E. Smith
2100 Gatun Street
Del Mar, CA 92014
(619) 755-7794
Propria Persona

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Roulette, et al. v. Smith, Appeal No. D017058; N.Co.S.Ct. No. N49451.

PROOF OF FILING (PRIORITY MAIL) AND SERVICE BY MAIL

I, the undersigned, say:

I am a citizen of the United States, over 18 years of age, self-employed in the County of San Diego, State of California, in which County the within mentioned mailing occurred, and not a party to the subject matter. My business address is 5665 Oberlin Drive, Suite 100, San Diego, California 92121. I filed (priority mail) and served the within: PETITION FOR REHEARING (a true and correct copy of which is attached) by United States mail addressed as follows:

Clerk of the 4th DCA
Court of Appeal – Division One
Fourth Appellate District
750 "B" Street, Suite 500
San Diego, CA 92101
(Original plus 4 copies)

Clerk of the Superior Court
North County Branch – Dept. M
325 So. Melrose Drive
Vista, CA 92083
(1 copy)

Mark A. Potter, Esq.
Attorney at Law
5090 Shoreham Place, Suite 101
San Diego, CA 92122-5934
For Respondent City (1 copy)

Kristine P. Nesthus, Esq.
Scalone, et al., Esqs., Attorneys at Law 7855 Ivanhoe Avenue, Suite 420
La Jolla, CA 92037
For Respondents Roulette, Et al. (1 copy)

David L. Mulliken, Esq.
Latham and Watkins, Esqs., Attorneys at Law 701 B Street, Suite 2100
San Diego, CA 92101-8197
For Respondents Roulette, Et al. (1 copy)

California Supreme Court
SouthTower-Eighth Floor
303 Second Street
San Francisco, CA 94107
(5 copies)

The documents were then placed in envelopes, which were sealed, and with the postage thereon fully prepaid, either deposited with the United States Postal Service or placed for collection and mailing by me on June 22, 1993 at Solana Beach, California, following ordinary business practices.

There is delivery service by United States mail at the place so addressed or regular communication by United States mail between the place of mailing and the place so addressed. I declare under penalty of perjury under the

laws of the State of California that the foregoing is true and correct. Executed on June 22, 1993 in San Diego, California.

/s/ Norma J. Hewitt
Norma J. Hewitt

James E. Smith, Propria Persona
2100 Gatun Street
Del Mar, CA 92014
(619) 755-7794

For Petitioner, Appellant, Defendant and Cross-Complainant James E. Smith

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY,	
Respondents/Plaintiffs/ Appellees,	**CASE NO. D017058 (No. Co. Sup. Ct. Case No. N49451)**
v.	
JAMES E. SMITH; and DOES 1 through 20, inclusive,	**PETITION FOR REHEARING**
Petitioner/Defendant/ Appellant,	

JAMES E. SMITH,

Petitioner/Cross-Complainant/
Appellant,

v.

MARGARET L. ROULETTE, individually; MARGARET L. ROULETTE as trustee of Trust "B" under that certain Declaration of Trust dated November 29, 1971; S. SCOTT EMSLEY, individually; S. SCOTT EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; ROBIN S. EMSLEY, individually; ROBIN S. EMSLEY, as trustee under that certain Declaration of Trust dated April 18, 1983; CITY OF DEL MAR; CITY COUNCIL OF DEL MAR; and ROES [sic] 1 through 50, inclusive.

Respondents/Cross-Defendants/
Appellees.

Alphabetical abbreviations hereinafter are as follows:

Assessor's Parcel Number	APN
Clerk's Transcript	CT
Footnote	FN
Judicial Notice	JN
Line	L
Lines	LL
Opinion dated 6/9/93	OP

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I.

INTRODUCTION

California Rules of Court 27 and 29(b)2 provides for Petitioner's filing of this "Petition for Rehearing".

For convenience to all parties Appendix "A" hereto is the (16) page Opinion, filed on June 9, 1993 by the 4th

DCA; and page 17 is a copy of the 6/10/93 mailing to Petitioner; hereinafter referenced as Op p #.

The courts OP words which follow clearly establish that the OP should be reversed;

OP FN 3, p 6 which states:

> "First, we note the *assessment roll* does not contradict the Subdivision Map Act by *clearly indicating the alleys were separate from the lots.*" Emphasis added.
>
> . . .
>
> "when he stated: 'It is my understanding that the tax *assessor's map* does not establish lot lines; *they are established by the subdivision map'.*" Emphasis 'assessment roll' and 'assessor's map' added. Other emphasis in OP.

From the above OP FN 3 quote one sees *'assessment roll'* and *'assessor's map'* treated in the OP as one and the same. They are two entirely separate terms with two entirely separate meanings.

The *'asssessment roll'* (Govt. Code § 66424) is the key to determine if *a conveyance* created a subdivision. Hence, the quote, supra, from "First . . . lots" clearly indicates from the courts own words that no subdivision occurred by Petitioner's conveyance of lots H, I and J, Map No. 1285 by expression of a "contrary intent" concerning the clearly indicated separate vacated alleys/street reflected on the *"assessment role"* and depicted on Final Map No. 1285.

OP p 15 last ¶ and p 16 states:

> "As we have previously explained, Smith sold Roulette and the Emsleys only part of lots H, I and J, retaining the alley portion of those lots himself; Smith did not sell the same lots as those depicted on the subdivision map. Therefore, Government Code section 66499.35, subdivision (d) does not apply."

Supra, OP p 15-16 quote "As . . . apply." is totally contradicted by, supra, OP FN 3 quote "First . . . lots". Exhibit 1 in evidence (i.e. Final Subdivision Map No. 1285); and Exhibit 4 in evidence (i.e. Certified assessor's Assessment Roll); and Exhibit 20 in evidence (i.e. 7-7-88 Recorded Record of Survey Map No. 11679); are irrefutable evidence that no subdivision occurred by Petitioner's conveyance of lots H, I and J, Map No. 1285 as the courts words acknowledge, supra, OP FN 3, p. 6 to wit:

> "First, we note the *assessment roll* does not contradict the Subdivision Map Act *by clearly indicating the alleys were separate from the lots.*" Emphasis added.

II.

ISSUE OR MATERIAL FACT THAT WAS OMITTED FROM OR MISSTATED IN THE OPINION OF THE COURT OF APPEAL

A.

LOTS H, I, AND J WERE CONVEYED PRECISELY AS THEY WERE DEPICTED ON THE ASSESSOR'S ROLL AND ON FINAL SUBDIVISION MAP NO. 1285.

The material misstatement of fact by the court is as follows:

> "Smith did not sell the same lots as those depicted on the subdivision map." OP p 15, last sentence.

The fact that the court's statement is incorrect can be proven within the court's OP. Furthermore, correcting of the statement to read, "Smith sold the same lots as those depicted on the subdivision map", will confirm what Petitioner has been contending throughout this litigation and that is; one cannot be guilty of an illegal subdivision of a lot, as a matter of law, if that lot(s) as depicted on the assessor's roll and Final Map No. 1285 was conveyed to the grantee.

The court recognizes that the alleys and lots are separately designated units of property.

> "First, we note the assessment roll does not contradict the Subdivision Map Act *by clearly indicating the alleys were separate from the lots.*" OP p 6, FN 3. Emphasis added.

The court then holds:

> "Under the Civil Code, it is presumed each lot in the Snakewall property *which was adjacent to a street or alley* extended to the centerline of the street or alley . . . ". Emphasis added. OP p 10.

The court clearly recognizes that lots H, I and J are "adjacent to a street or alley." Id. It is precisely that lot(s) which is adjacent to the street or alley which was transferred. The entire lawsuit is based upon the premise that Petitioner ". . . retained the alley portions . . ." OP p 11. Hence, Petitioner conveyed the "lot adjacent to the street or alley." OP p 10.

This lot which was adjacent to the alley, was recognized not only by this court as being clearly delineated, but was also recognized as such by the trial court. Regarding the depiction of lots H, I, and J on Final Subdivision Map No. 1285 the trial court found:

> "The court: I won't judicially notice it, but I will indicate for the record that on this drawing there are existent alley ways which do not show a lot line to the center of the alley way." RT Vol. IX, p 409, LL 27-28 and p 410, LL 1-11.

A trial court's findings will not be upset on appeal. Indeed, as shown herein, this court agrees with that finding throughout its opinion up until the holding:

> "Smith did not sell the same lots as those depicted on the subdivision map." OP p 15, last sentence.

Clearly, that statement is incorrect.

B.

MATERIALITY OF COURT'S INCORRECT STATEMENT

Initially, the court's incorrect statement illustrates the basis for the confusion surrounding the primary issue in this case. That is, can a 'lot' as that term is utilized in C.C. §§ 831 and 1112 'quiet title action' cases be transplanted and utilized as a Subdivision Map Act 'lot' for purpose of a Subdivision Map Act case? The answer is no; and this court has illustrated why the two 'lots' are different; and also why they aren't susceptible to being commingled. The court illustrates the distinction between a Map Act 'lot' and a C.C. 831 or 1112 'lot' by holding:

> " . . . it is presumed each lot in the Snakewall property which was adjacent to a street or alley extended to the centerline of the street or alley . . . " OP p 10.

and;

> "He thus subdivided the lots, creating new units of land by dividing the alley portions from the adjacent lots." OP p 11.

Petitioner submits it is conceptually and legally impossible to divide a 'lot' which is already 'adjacent' to an alley by the expression of a "contrary intent". In otherwords, as noted previously by this and the trial court, the lots and alleys are "clearly indicated as being separate" on the Map. OP p 6, FN 3; RT Vol. IX, p 409, LL 27-28 and p 410, LL 1-11. Therefore, the conveyances could not divide that which is already separate and divided as shown on Map No. 1285 (i.e. street/alleys).

Nevertheless, the holding of the court cited above from the OP p 10 graphically illustrates the two types of lots. One of the lots is "presumed to . . . extend to the centerline". C.C. §§ 831 or 1112. The other type of 'lot' is already "adjacent to the street or alley". [Subdivision Map Act 'lot', Govt. Code §§ 66499.52(a), 66499.57 and 66434(d)].

As the court points out, one lot is only presumed to extend to the centerline while the other is depicted on the map; to wit, 'Presumed v. Depicted'.

Final Map No. 1285 as well as the assessor's roll depicts real property as it has been divided and boundaried by the legally authorized governmental authorities; to wit the city engineer or county surveyor. Govt. Code

§ 66499.52(b) which therein references §§ 66434(a) to (f) and 66499.35(d)(e).

Furthermore, the term 'lot', as it was intended to be used in the context of a Subdivision Map Act case, refers to that real property as boundaried on the subdivision map.

> "It is the opinion of this office that the word 'lot' . . . as used in both the Subdivision Law and the Subdivision Map Act refer to a lot of *real property*." [Emphasis in original]. *California Attorney General Opinion* (1962) Vol. 39, p 82 at p 85.

A 'lot' whose boundary line is *technically* the center of the street therefore has boundaries which are only *'presumed'* to extend to the centerline of the adjacent street or alley. OP p 10; *Earl v. Dutour* (1919) 181 Cal. 58 p 60.

Consequently, there are two types of 'lots' which have been brought into question within the confines of this case. One type is intended by the courts in the quiet title cases to be visualized, i.e. "considered to extend", "presumed to extend", "assumed to exist". OP p 10; *Speer v. Blasker* (1961) 195 Cal. App. 2d 155, 161; *Anderson v. Citizens Sav. Etc. Co.* (1921) 185 Cal. 386, 393.

The other type of lot, which appears to have gotten short shift at best, is the 'lot' the court referred to as being adjacent to the street or alley, (OP p 10), which is clearly indicated on Final Map No. 1285 as being separate from the alleys/street. OP p 6, FN 3; RT Vol. IX, p 409, LL 27-28 and p 410 LL 1-11. It is this latter lot which can only be subject to the strictures of the Subdivision Map Act and

any case coming under it. Govt. Code §§ 66424, 66499.52(a) and 66499.57; *California Attorney General Opinions* (1962) Vol. 39, p 82 at p 85.

Therefore, by correcting the court's holding to read that "Smith transferred lots H, I and J as they were depicted on the Final Subdivision Map No. 1285"; as the court must do in light of the remaining portions of its holding, the court will then agree that the conveyances from Petitioner to Roulette and the Emsleys was not an illegal subdivision of land but was merely the conveyance of property already properly subdivided on Final Map. No. 1285.

C.

THE COURT OMITTED ADDRESSING THE SEPARATION OF POWERS DOCTRINE

The court finds:

> "The objective of the Subdivision Map Act is to regulate and control the design and improvement of subdivisions." OP p 6.

The language of the court herein provides that it is the legislature which has the function of controlling the design of subdivisions. "Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies." B. & P. Code § 10249 et seq. and 11000 et seq.; *Witkins, Summary of California Law,* Ninth Edition, Vol. 4, Real Property, §§ 44-51, pp 259-268.

Given that the trial court sought to establish boundaries for lots H, I and J which the trial court itself

acknowledged are not shown on the subdivision map, (RT Vol. IX, p 409, LL 27-28 and p 410, LL 1-11); and boundaries which this court acknowledges aren't shown, (OP p 6, FN 3, "clearly indicating alleys are separate from the lots"); then, for the court to determine that an issue based under the Subdivision Map Act is founded upon boundaries of lots not established by the legislature is violative of the 'Separation of Powers Doctrine'[1]; thereby

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[1] Pending Case No. D017742/N51351 heretofore JN concerning Snakewall lot U, Map No. 1343, (Exhibit 1 in evidence), vividly illustrates this "Separation of Powers Doctrine". See Exhibit 2 in evidence, (1-18-91 letter to Petitioner from the Calif. Coastal Commission), 3rd ¶ , which states: "You have today submitted a copy of the original 1911 Subdivision Map #1343. *It appears that the lot configuration shown on that map is the same as the lot configuration shown in the permit application referenced above.*" Also, see Exhibit 2 in evidence, (1-7-91 Calif. Coastal Commission Staff Report, APN 299-192-24, lot U, Map No. 1343), p 5, 4th ¶ , which states: "*the lot configuration shown on the submitted plans appears to match exactly that shown on the 1911 subdivision map #1343.* No Certificate of Compliance was required by the City of Del Mar." Also, see Exhibit 2 in evidence, (2-5-91 Calif. Coastal Commission approval of Pifer's dwelling on lot U, Map No. 1343, APN 299-192-24 at p 1. *Del Mar gave final approval for Pifer's dwelling on lot U, Map No. 1343, on 11-5-90.* All of the preceding is at RT, Vol. VII, pp 322-329. SLE N-U, recorded on 1-14-91 "Violation Notice" on Pifer's lot U, Map No. 1343, *references APN 299-192-24,* i.e. the same APN as is on, supra, Exhibit 2 in evidence.

Exhibit 5 in evidence, (certified Minutes of the 12/17/90 Del Mar City Council meeting), reflects on p 2, Item 14, removal of the 11/19/90 minutes approval from the consent calendar at the request of Petitioner; and p 4, Oral Communications reflect Petitioner and Joyce Chapman-Smith spoke regarding whether to record the 10/30/90 recorded "Violation Notices", (Exhibit 32 in evidence); and p 6, Item 12, concerning lots *other than* Snakewall lots, i.e. lots V and W, Block 32, Map No. 1343, (same Map

rendering the court jurisdictionally impotent, whichever court that happens to be.

No. 1343 as Exhibit 1 in evidence depicting Pifer's lot U), reflects that Del Mar *did not* consider 100% of this 10' X 25' alley vacation addition to said lots V and W, Map No. 1343, to be an "Illegal Subdivision"; and illustrates that concerning lots V and W, Map No. 1343 Del Mar's position concerning C.C. §§ 831 and 1112 and Govt. Code § 66424, etc., et al is in 100% harmony with Petitioner's position in D017058, D017742 and D015814 as Petitioner expressed in his 10/13/90 letter with referenced attachments, i.e. Exhibit 30 offered in evidence; and p 7, Item 1, 2nd ¶, last sentence, reflects the removal of the word "strip" from the 11/19/90 lots H, I and J motion passed concerning the 10/30/90 "Violation" Recordation *"because that word was not included on the agenda."* See Exhibit 31 in evidence, (RT, 11/19/90 Del Mar City Council meeting), which reflects "strip" insertion by Krauel, Esq. and sanctioned by council person Hugo-Martinez, Esq. as follows:

> "Mr. Krauel: The only issue that the council can look at tonight is whether lot H was, the old lot H, was illegally subdivided into a strip portion and a building portion. The cures, whether its a lot line adjustment or conveyance or anything like that – there are a lot of cures. This is not an uncurable problem that we have in the long sense, but tonight you're only looking at whether that by cutting lot H up when it was sold, that was legal or not. Your action would be, if you're going with what staff is recommending, *it was a motion to direct staff to file the Notice of Violation* for the reasons stated by staff." Emphasis added.
>
> "Ms. Hugo-Martinez: I, its their motion?"
>
> "Mayor McMillan: Yes."
>
> "Ms. Hugo-Martinez: I move that we direct staff *to record a Notice of Violation of Illegal Subdivision regarding lots H, I, J, Block 12 of Arden Heights, Unit No. 3, according to Map No. 1285,* as per the staff's analysis."

The boundaries of the 'lot(s)' alleged to have been illegally subdivided were not created by the legislature. They were created by the court as a result of the court's interpretation of C.C. §§ 831 and 1112 and attendant case law.

The only 'lot(s)' which can be subject to the strictures of the Subdivision Map Act is a lot(s) established pursuant to the requirements of the Map Act. Govt. Code § 66499.52(a)(b). The boundaries of the Map Act 'lots' can only be established in conformity with the legislative dictates found in the Act itself, i.e., the Act "regulates and controls the design . . . of subdivisions". OP p 6.

D.

THERE IS NO 'ALLEY PORTION' OF A SUBDIVISION MAP ACT LOT.

The court states:

"In 1988, when Smith sold lots H, I, and J, he retained the alley portions of the lots. He thus

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Emphasis added.
"Mr. Krauel: Just, just to clarify. *That's the strip portions*. We've already filed a Notice of Vi –" Emphasis added.
"Ms. Hugo-Martinez: That's right."
"Ms. Winterer: I second."
"Mayor McMillan: Discussion?"
. . .
"Mayor McMillan: All in favor?"
"Council members: Aye."
"Mayor McMillan: All opposed?"
(no audible response)
"Mayor McMillan: It's unanimous. Thank you."
Exhibit 31 in evidence, p 17, LL 20-28, p 18, LL 1-13, and p 19, LL 10-14.

> subdivided the lots, creating new units of land by dividing the alley portions from the adjacent lots." OP p 11.

Under a C.C. §§ 831 or 1112 analysis and application of the presumptions therein to a particular fact situation, one envisions, as this court has noted, lot lines which are "presumed to extend to the centerline of the adjacent street." OP p 10. Under that presumed lot envisagement it would be appropriate to refer to the alley as a "portion of the lot". However, it is not appropriate in a Map Act case.

This court has noted that Final Map No. 1285 and the assessor's roll clearly show the lots *as not* extending to the centerline of the adjacent street. OP p 6, FN 3. As was shown previously, a 'lot' as that term is intended to be used by the legislature, has its configurations clearly depicted on the map and assessor's roll as being separate from the adjacent alley. Therefore, a Subdivision Map Act 'lot' can have no 'alley portions'; and retaining ownership of the vacated street/alleys by the expression of a "contrary intent" can have no significance with regard to a Subdivision Map Act illegal subdivision case.

E. OP P 1

D017058 OP only concerns and addresses No. Co. Super. Ct. Case No. N49451; and N51351 is a pending appeal under Case No. D017742; and Judge Howatt's name is William J. not William D. CT Vol. VIII, pp 1765 and 1768.

F. OP P 2

FN 2 misstates that lots H and I, Map No. 1285, border a perimeter public street. Only lot J, Map No. 1285 borders public Zapo Street. Exhibit 1, Map No. 1285 in evidence.

G. OP P. 3 and 4

Lot H, Map No. 1285 was sold to the Emsleys as trustees under that certain declaration of trust dated 11/18/83; and lots I and J, Map No. 1285 were sold to Roulette as trustee of trust "B" under that certain declaration of trust dated 11/29/71. Exhibits 10, 11, 12 and 13 in evidence.

The 9/24/90 hearing notice to Roulette, the Emsleys and Smith, dated 8/31/90, concerned per the Notice Caption "Certificate of Occupancy". Exhibit 29 in evidence. Smith, the vacated alley fee owner, received no notice concerning Del Mar's intent to record the "Notices of Violation of Illegal Subdivision" which were recorded on 10/30/90; and Smith's first knowledge of said recordation was on 11/27/90 when he read the N49451 Complaint which contained the 10/30/90 recorded "Violation Notices" as Exhibit "A" thereto. SLE, N-L. MMMM, 11/5/90 letter, p 2, 1st ¶ and MMMM 11/20/90 City memo of Petitioner's phone call, last ¶, and N49451 Complaint served on 11/27/90. The 9/24/90 hearing was continued with no action taken except to continue the hearing until 10/22/90 at 2:30 P.M. SLE N-J, p 6. On 10/19/90 Haynie, Esq. on behalf of Roulette, et al requested that the 10/22/90 continued hearing, supra, be continued to 11/12/90. SLE MMMM, letter dated

10/19/90, 1st ¶. The 11/12/90 continued hearing was continued to 12/4/90 when Haynie, Esq. withdrew the application. SLE MMMM 12/4/90 letter or DDD.

Haynie, Esq. on behalf of Roulette, et al provided Del Mar on 10/26/90 their "hold harmless" letter preceding the 10/30/90 "Violations" recordation. Exhibits 32 and 33 in evidence.

Smith on 10/13/90 advised all Respondents and their counsel by letter, with attachments therein referenced, of his objections, and the basis therefore, concerning the 9/24/90 hearing, continued to 10/22/90 at 2:30 P.M.; Notice of Occupancy, (Exhibit 29 in evidence), expanded on 9/24/90 to "Intent to record said Violation Notices", (SLE N-J). Exhibit 30 offered in evidence.

H. OP P 5

The filed on 11/20/90 Case No. N49451 complaint was served on Petitioner on 11/27/90. See Proof of Service. On 11/20/90 by phone to the City Manager's office Petitioner advised the City of his willingness to convey one-half of the vacated alleys to Roulette and the Emsleys. SLE MMMM, 11/20/90 City Memo and JJJJ. 11/20/90 was the day following the 11/19/90 city council meeting wherein Krauel, Esq. and Hugo-Martinez, Esq. inserted "strip" (Exhibit 5 in evidence), in the Noticed question of; "Whether to Record the Notices of Violation of Illegal Subdivision Lots H, I and J, Map No. 1285; and voted to record the 10/30/90 recorded "Notices of Violation . . ." Exhibit 31 in evidence, p 1; and p 17, LL 20-28 and p 18, LL 1-13; and p 19, LL 10-14 (also, quoted at FN 1, supra). Roulette and the Emsleys refused to

accept Petitioner's offer to convey them, (SLE JJJJ), one-half the alleys referenced on the recorded "Notices of Violation . . ." Exhibit 32 in evidence. Also, see SLE NNNN 12/17/90 Mullen, Esq. letter to Zajac, Esq.

The order for damages of $1,046,012.81 awarded under Govt. Code § 66499.32 "recission" [sic] should be called restitution.

I. OP P 8

The courts quote from Del Mar Ordinance § 24.70.010 states; ". . . adjust a legal lot . . .". FN 3, p 6 states "First . . . roll . . . does not contradict . . . by clearly indicating the alleys were separate from the lots". OP p 3, 2nd ¶, from Resolution No. 87-71, (Exhibit 16 in evidence), states; ". . . 20 lots of record . . .". Also, the 7/15/86 Del Mar Certificate of Compliance letter, (Exhibit 7 in evidence), 1st ¶ states: ". . . legal lots of record . . .". The conveyance deeds for lots H, I and J, Map No. 1285, (Exhibits 10 and 11 in evidence), conveyed lots H, I and J, Map No. 1285. Accordingly since 100% of lots H, I and J, Map No. 1285 were conveyed Govt. Code § 66412 and Ordinance § 24.70.010 have no bearing on this case whatsoever. In addition see C.C.P. § 2077(6).

The court can observe conditions wherein a Govt. Code § 66412 lot line adjustment was required and was approved by Del Mar; concerning Binkley's lot G, Map No. 1285 and Petitioner's lot 780, Map No. 1592, (Exhibit 1 in evidence), at Exhibit 24 offered in evidence; approved by Del Mar's City Clerk and Planning Director on 7/26/89. Exhibit 24 offered in evidence; p 2 and 3 reflect the portion of lot G, Map No. 1285 which became

and now is a portion of lot 780, Map No. 1592. Record of Survey Map No. 12280 recorded on 8/10/89, (Exhibit 25 offered in evidence), reflects Exhibit 24 offered in evidence in the County Recorder's office. The metes and bounds description of the portion of lot G, Map No. 1285 which is now a part of lot 780, Map No. 1592, pursuant to Del Mar's approved lot line adjustment, (Exhibits 24 and 25 offered in evidence), was deeded to Petitioner from the Binkley's and recorded on 4/18/91 by individual grant deed, Doc. #1991-0176866, contained at Exhibit 27 offered in evidence, 7th page from the last page, and Exhibit A thereto, (6th page from the last page), is said metes and bounds description portion. This "portion" is depicted on the (20) foot private access easement for lots G, H, I, J and S, Map No. 1285; and lots 780 and 785, Map No. 1592; and lot T, Map No. 1343; at Exhibit 26 offered in evidence, which was JN, (RT Vol. XI, p 565, LL 6-12), by the lower court, as the highlighted portion of lot G, Map No. 1285 which lies in the (20) foot private access easement, pursuant to the sales escrow instructions for lot G, Map No. 1285. Exhibits 24-27 offered in evidence.

While the sales escrow instructions for lots H, I and J, Map No. 1285 provided for a similar lot line adjustment Del Mar refused approval of SLE OO and PP and the highlighted portions of lots H, I and J, Map No. 1285 within the (20) foot private access easement *have not been deeded* to Petitioner from Roulette and the Emsleys. Unless Del Mar approves and signs SLE OO and PP a deed transfer of these portions would be an illegal subdivision.

The OP, p 8, Govt. Code § 66499.36 discussion fails to set forth that in the 1st ¶ of said § it states; "the notice

shall . . . and an explanation as to why the subject parcel is not lawful under (a) or (b) of section 66412.6." This required explanation, (i.e. *shall*), is missing from the intent notices. Govt. Code § 66412.6(a) states; " . . . any parcel created prior to March 4, 1972 *shall be conclusively presumed to have been lawfully created if at the time of the creation of the parcel there was compliance. . .*" Emphasis added. Govt. Code § 664126(b) states; " . . . any parcel created prior to March 4, 1972, *shall be conclusively presumed to have been lawfully created if any subsequent purchaser acquired that parcel for valuable consideration without actual or constructive knowledge of a violation* of this division or the local ordinance." Emphasis added.

J. OP P 9

The courts discussion of Govt. Code § 66499.32 omits next to the last ¶ of § 66499.32 which states; "The provisions of this section *shall not apply to the conveyance of any parcel of real property . . . identified in a recorded final map . . . from and after the date of recordation.*" Emphasis added. See Exhibit 1 in evidence.

The courts discussion of Govt. Code § 66499.35 omits § 66499.35(d)(e) which state:

> "(d) A recorded final map . . . *shall constitute a certificate of compliance with respect to the parcels of real property described therein.*" Emphasis added. Exhibit 1 in evidence.
>
> "(e) An official map prepared pursuant to subdivision (b) of section 66499.52 *shall constitute a certificate of compliance with respect to the parcels of real property described therein* . . . with the

approval of the city engineer or county surveyor . . ." Emphasis added. Exhibit 1 in evidence.

Under II, OP, p 9, 1st ¶, the courts OP Fn 3, p 6, L 4 acknowledges " . . . the alleys were separate from the lots." Exhibit 1 in evidence.

Under II, OP, p 9, last ¶, the court's OP, p 3, 3rd ¶, acknowledges Petitioner's expressed "contrary intent" in the lots H, I and J, Map No. 1285 conveyance deeds. Exhibits 10 and 11 in evidence.

K. OP P 10

The courts OP, 2nd ¶, acknowledges upon dedication of a street; " . . . public . . . acquires only an easement . . . "; and " . . . adjacent landowner . . . retains the fee interest"; and "if the government vacates . . . then ownership", (i.e. dedication easement ownership as fee interest retained with landowner per, OP, 2nd ¶, supra), "reverts to the fee owners, usually the adjacent landowners." In 1925 when the alleys were vacated (OP, p 3, 1st ¶), all (20) Snakewall lots and alleys were fee owned by Petitioner's grantor's grantee (i.e. Coy Burnett) who by said vacation acquired deedable "possession and occupancy" fee title to all the alleys which were deeded to Petitioner's grantor in 1972, (Exhibit 18 in evidence); and deeded to Petitioner on 12/9/77, (Exhibit 15 in evidence).

The Civil Code §§ 831 and 1112 presumptions address alley ownership where a "contrary intent" has not been expressed by a common grantor to Roulette and the Emsleys which is only Petitioner as Petitioner has fee title to said alleys. Exhibit 15 in evidence. Also, see preceding paragraph.

The last ¶, OP, p 10, is contradicted by the courts OP, p 9, "unless a contrary intent is shown."

L. OP P 11

The intent of the original subdivider of Map Nos. 1285, 1343 and 1592 has nothing to do with the application of C.C. §§ 831 and 1112. *This courts theory concerning the original subdivider differs from the lower courts theory*[2] at C.T. Vol IX, p 2157, last ¶, wherein the lower court states; "*After the vacation of the streets and alleys* in 1925, there was a presumption pursuant to Civil Code §§ 831 and 1112 that the owners of lots H, I and J owned to the center . . . " Emphasis added.

The best evidence to show that the original subdivider's intent is meaningless is Petitioner's and his predecessor owner grant deeds conveying alley fee ownership to them, (Exhibits 15 and 18 in evidence); and Final Map Nos. 1285, 1343 and 1592, (Exhibit 1 in evidence), which do not depict the lot lines to be the center of the alleys; and the courts words at OP, p 10 discussed in the 1st ¶ of K. OP p 10, supra; and the "contrary intent" expressed by Petitioner, (OP p 3, 3rd ¶), as evidenced by the grant deeds to Roulette and the Emsley's, (Exhibits 10 and 11 in evidence); and C.C. §§ 831 and 1112; and C.C.P. § 2077(6).

Pilkington v. Fausone, (1970) 11 Cal. App. 3d 349, 351-352, OP, 2nd ¶, *does not* stand for any portion of any lots depicted on a final map being subject to the public

---

[2] OP p 11 states: "thus, at the time of the original subdivision, lots H, I and J included half of the adjacent alley."

easement and its reverting on vacation. *Pilkington* addresses streets/alleys. In addition see Govt. Code § 66412.6(a)(b) "conclusive presumptions" discussed, supra, I. OP p 8, 4th ¶.

In response to the last ¶, OP, p 11 by reference, supra, I. OP p 8, ¶1-4 are incorporated here in their entirety. In addition no lots H, I and J, Map No. 1285 lot lines have changed. Exhibit 1 in evidence. C.C.P. § 2077(6).

M. OP P 12

1st ¶, p 12, misstates "Smith contends . . . ". Petitioner's position since 10/13/90[3] and his Motion for Judgment on the Pleadings, Summary Judgment, et al is that this case is a very simple "matter of law" case; to wit: contrary intent was expressed; and next to the last ¶ of

---

[3] Petitioner's position was expressed on 10/13/90, (see Exhibit 30 offered in evidence), and has never changed up to today. Exhibit 30 offered in evidence contains a discussion in the letter of the law referenced therein sufficient to have prevented the 10/30/90 "Violation Notices" recordation; and sufficient for Judge Johnson to have granted Petitioner's Motion for Judgment on the Pleadings as a matter of law; and sufficient for Judge Prager in D015814/N50142 to have found in favor of Petitioner as a matter of law; and sufficient for Judge Howatt, Jr. to have found in favor of Defendant's Summary Judgment Motion as a matter of law; and sufficient for this court to reverse its 6/9/90 OP as a matter of law; and sufficient to sustain Petitioner's "waiver" and "estoppel" defenses, (see OP, p 16, FN 5), as a matter of law, as plead [sic] in Petitioner's answer to the Complaint, etc., et al in light of Exhibits 1, 2, 4, 5, 7, 10, 11, 15, 16, 17, 18, 20, 23, 29, 31 and 33, (specifically 5, 7, 16, 17, 23 and 31), all in evidence; and Exhibit 30 offered in evidence.

Govt. Code § 66499.32 bars the complaint; and the "conclusive presumptions" at Govt. Code § 66412.6(a)(b) legally prohibit the validity of the "Violation Notices; Govt. Code §§ 66499.52(a)(b) and 66499.57 " . . . it shall be lawful and sufficient . . ."; etc. et al as has been extensively heretofore briefed. Exhibit 1 in evidence. C.C.P. § 2077(6).

N. OP P 13, 14 AND 15

Supra, M. OP p 12 and Govt. Code § 66499.32, next to the last ¶, as the court sets forth here should have shut this case down at Petitioner's Motion for Judgment on the Pleadings as a "matter of law"; and pursuant to Govt. Code §§ 66499.35(d)(e) as referenced at 66499.52(a)(b) Roulette and the Emsleys possessed a Certificate of Compliance since their purchases on 4/15/88 and 6/14/88; and Govt. Code § 66412.6(a)(b) "conclusive presumptions" legally prohibit the validity of the "Violation Notices"; Govt. Code § 66499.57 " . . . it shall be lawful and sufficient . . .", etc. et al as has been extensively heretofore briefed. Exhibit 1 in evidence. C.C.P. § 2077(6).

O. OP P 15 and 16

The court states; "Smith did not sell the same lots as those depicted on the Subdivision Map. Therefore, Government Code Section 66499.35, subdivision (d), does not apply."

OP p 6, FN 3 states; First, we note the assessment role does not contradict the Subdivision Map Act *"by clearly*

indicating the alleys were separate from the lots." Emphasis added.

Exhibit 1, 10, 11 and 32 in evidence refutes 100%, supra, ¶ 1; and sustains, supra, ¶ 2. This OP contradicts itself and totally negates the Subdivision Map Act as well as all of the C.C. §§ 831 and 1112 cases.

III.

CONCLUSION

It is contended that the foregoing material misstatements and omissions affect the outcome of this case. This court should grant a rehearing in this matter in order to examine that impact. By correcting the misstatements, many of which are correctable by examining other portions of the court's opinion, the court will see that the issues presented are clearly subject to a different legal interpretation and adjudication as a matter of law.

The rehearing request should be granted and the opinion reversed.

Respectfully submitted

Dated: June 22, 1993 /s/ James E. Smith @ 1407
James E. Smith
Propria Persona

[Appendix "A" reproduced herein at pages B-27 - B-42]

APPENDIX F

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO NORTH COUNTY BRANCH

MARGARET L. ROULETE, S. SCOTT EMSLEY and ROBIN S. EMSLEY, Plaintiffs, v. JAMES E. SMITH; and DOES 1 through 15, inclusive, Defendants.	Case No. N 49451 [consolidated with 51351] **ORDER AFTER HEARING ON MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION OF ISSUES** (Filed Apr. 15, 1992)

The motion of Defendant James E. Smith for summary judgment or summary adjudication of issues as to the complaint filed by Plaintiffs Margaret Roulette, Scott Emsley and Robin Emsley in San Diego Superior Court case number N 49451 came on regularly for hearing on April 3, 1992 in Department D of the above-entitled Court, the William J. Howatt, Jr., Judge Presiding.

Defendant James E. Smith appeared in propria persona. Plaintiffs appeared by counsel Kristine P. Nesthus.

Having carefully considered all oral and written arguments presented and having taken the matter under submission, the court rules as follows:

Defendant's motion is denied. The Court finds as a matter of law that Deft subdivided lots H, I & J by retaining a portion of the adjoining alley in violation of the Subdivision Map Act.

Pursuant to Government Code § 66424, a subdivision is defined as follows:

> "the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease, or financing, whether immediate or future except for leases of agricultural land for agricultural purposes."

If land is divided, compliance must be had with the Subdivision Map Act.

The court is unpersuaded by Defendant's argument that there was no violation of the Subdivision Map Act because Defendant conveyed only that real property depicted in the latest equalized county assessment roll and the adjoining alley was not included within that depiction. The reference to the "assessment roll" in § 66424 is merely for the purpose of providing a convenient method of identifying the property and has no effect on the application of the Subdivision Map Act, [See 62 Ops. Cal. Atty. Gen. 147], nor upon what is meant or intended to be a "division" under the Act.

After the vacation of the streets and alleys in 1925, there was a presumption pursuant to Civil Code §§ 831 and 1112 that the owners of lots H, I and J owned to the center of the adjoining alley and accordingly, had the

right to possess and occupy that portion of the alley. While Defendant claims that a contrary intent could be shown to rebut the presumption and was in fact shown by his elimination of the alley from the conveyance to Plaintiffs, this does not excuse Defendant from complying with the Subdivision Map Act.

IT IS SO ORDERED.

Dated: APR 15 1992 /s/ William J. Howatt, Jr.
William J. Howatt, Jr.
Judge of the Superior Court

APPENDIX G

Robert L. Zajac, Esq.
HILLYER & IRWIN
A Professional Corporation
Attorneys at law
550 West C Street – 16th Floor
San Diego, California 92101
(619) 234-6121
8131.5
Attorneys for Defendant JAMES E. SMITH

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

NORTH COUNTY JUDICIAL DISTRICT

MARGARET L. ROULETE, S. SCOTT EMSLEY and ROBIN S. EMSLEY, Plaintiffs, v. JAMES E. SMITH; and DOES 1 through 15, inclusive, Defendants.	CASE No. N49451 ANSWER TO COMPLAINT (Filed Feb. 25, 1991)

Defendant JAMES E. SMITH ("SMITH") answers the complaint on file herein as follows:

1. For an answer to paragraph 1, SMITH lacks sufficient information or belief as to what plaintiffs intended to construct on the parcels and what processes, if any, plaintiffs have been engaged in with regard to the parcels, and what expenses have been incurred by plaintiffs.

With regard to the remaining allegations in paragraph 1, SMITH admits these allegations.

2. For an answer to paragraph 2, SMITH denies all allegations contained therein.

3. For an answer to paragraph 3, SMITH denies all allegations contained therein.

4. For an answer to paragraph 4, SMITH admits the allegations contained therein.

5. For an answer to paragraph 5, SMITH admits the allegations contained therein.

6. For an answer to paragraph 6, SMITH lacks sufficient information to respond to the allegations contained therein, and on such basis denies all allegations contained therein.

7. For an answer to paragraph 7, SMITH admits the allegations therein, with the exceptions that the date referenced in line 10 should be June 13, 1988, and the date referenced in line 14 should be April 15, 1988.

8. For an answer to paragraph 8, SMITH admits the allegations contained therein.

9. For an answer to paragraph 9, SMITH admits the allegations contained therein.

10. For an answer to paragraph 10, SMITH admits the allegations contained therein.

11. For an answer to paragraph 11, SMITH admits the allegations contained therein, with the exception that Exhibit "K" is not a full and complete copy of the pertinent deed of trust.

12. For an answer to paragraph 12, SMITH admits that the parcels were legal lots of record at the time SMITH sold the lots to plaintiffs, and were represented to be legal lots of record based on a written letter, resolutions, and actions by the City of Del Mar, specifically referenced and incorporated by SMITH's cross-complaint. With regard to the remaining allegations contained in paragraph 12, SMITH denies all remaining allegations.

13. For an answer to paragraph 13, SMITH denies all allegations contained therein.

14. For an answer to paragraph 14, SMITH admits that the deeds or the subject lots did not convey the vacated alleys adjoining said lots, as such deeds specifically excluded the vacated alleys from the conveyances. With regard to the remaining allegations of paragraph 14, SMITH denies all remaining allegations.

15. For an answer to paragraph 15, SMITH lacks sufficient information and belief to answer the allegations contained therein, and on such basis denies all allegations in said paragraph.

16. For an answer to paragraph 16, SMITH lacks information and belief to answer the allegations contained therein, and on such basis denies all allegations in said paragraph.

17. For an answer to paragraph 17, SMITH denies that the parcels were or are illegal lots and further alleges that plaintiffs would have received a certificate of compliance if the conveyance of a portion of the vacated alleys was accepted by plaintiffs. SMITH further specifically denies the parcels were illegal lots at any time.

18. For an answer to paragraph 18, SMITH lacks sufficient information and belief to answer the allegations contained in said paragraph regarding the notices of intention and on such basis denies the allegations contained therein regarding said notices of intention. SMITH admits on information and belief that the City recorded the notices of violation on October 30, 1990.

19. For an answer to paragraph 19, SMITH lacks sufficient information and belief to answer the allegations regarding harm or plaintiffs' expenses. SMITH specifically denies that the lots are illegal and the allegation that plaintiffs cannot develop the lots or that such lots are useless.

20. For an answer to paragraph 20, SMITH admits and denies the incorporated paragraphs as set forth above.

21. For an answer to paragraphs 21 and 22, SMITH denies all allegations contained therein.

22. For an answer to paragraph 23, SMITH admits and denies the incorporated paragraphs as set forth above.

23. For an answer to paragraph 24 and 25, SMITH denies all allegations contained therein.

24. For an answer to paragraph 26, SMITH admits and denies the incorporated paragraphs as set forth above.

25. For an answer to paragraphs 27 through 36, SMITH denies all allegations contained therein. With regard to the allegations contained in paragraph 31, SMITH further specifically alleges that plaintiffs knew on

October 26, 1990 that the notices of violation would be recorded as on that date plaintiffs entered into a hold harmless agreement with the City of Del Mar regarding the notices of violation.

26. For an answer to paragraph 37, SMITH admits and denies the incorporated paragraphs set forth above.

27. For an answer to paragraph 38, SMITH admits the allegations contained therein.

28. For an answer to paragraphs 39 through 41, SMITH denies all allegations contained therein.

29. For an answer to paragraph 42, SMITH admits and denies to the incorporated paragraphs set forth above.

30. For an answer to paragraph 43, SMITH admits that there is an implied covenant of good faith and fair dealing which exists between the parties to these contracts.

31. For an answer to paragraphs 44 through 46, SMITH denies all allegations contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The complaint, and each alleged cause of action contained therein, fails to state sufficient facts to constitute a cause of action against this answering defendant.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have failed to take adequate steps to mitigate, alter, reduce or otherwise diminish their damages, if any, with respect to the matters alleged in the complaint, and by reason of such failure, plaintiffs are barred from recovery herein.

THIRD AFFIRMATIVE DEFENSE

With regard to the matters and allegations alleged in the complaint, plaintiffs' conduct with regard to the matters alleged in the complaint estops plaintiffs from any recovery in this action.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from seeking relief against this answering defendant under the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from seeking relief against this answering defendant under the doctrine of waiver.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' damages, if any, as alleged in the complaint were caused by their own actions, the actions of third parties, including the City of Del Mar, agents of plaintiffs, agents, employees and individuals representing the City of Del Mar, and other individuals unknown to this answering defendant.

SEVENTH AFFIRMATIVE DEFENSE

This answering defendant is informed and believes and thereon alleges that plaintiffs' complaint, and each cause of action contained therein, is barred under the applicable statute of limitations.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs are not the appropriate parties who contracted with this answering defendant and as such plaintiffs lack standing to pursue the present litigation.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to set forth material, necessary and essential allegations in plaintiffs' fraud cause of action.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from any relief in this action, including any recovery of damages and any rescission of the subject transactions under the doctrine of unclean hands.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from any rescission of the subject transactions, or any other relief in this action, based on their default prior to the recordation of the notices of violation.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from any relief in this action based on their failure to accept the conveyance by SMITH of portions of the vacated alleys, which the City of Del Mar acknowledges would have allowed plaintiffs to develop said lots.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from any recovery based on any notices of violation for the subject lots based upon plaintiffs' active encouragement and participation in the recordation of said notices by the City of Del Mar, and the hold harmless agreement given to the City of Del Mar.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from any recovery based on the notices of violation based on the fact that said notices were illegally recorded in violation of the pertinent Government Code sections.

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from any recovery of punitive damages from this answering defendant as any imposition of punitive damages would violate this answering defendant's pertinent Constitutional rights and safeguards.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiffs are barred from any recovery under, relief or recission [sic] of the subject agreements under the doctrine of equal fault.

WHEREFORE, SMITH prays for judgment as follows against plaintiffs:

1. That plaintiffs take nothing by virtue of their complaint;

2. That no decree or lien issue as requested in plaintiffs' prayer;

3. For SMITH's attorney's fees pursuant to Exhibits "F", "F" and "J" to plaintiffs' complaint;

4. For costs of suit; and

5. For such other and further relief as the court deems just and proper.

Dated: February 25, 1991 HILLYER & IRWIN

By: /s/ Robert L. Zajac
Robert L. Zajac
Attorney for Defendant
JAMES E. SMITH

VERIFICATION

I, JAMES E. SMITH, am the defendant in the above-entitled proceeding. I have read the foregoing Answer to Complaint and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification was executed at Del Mar, California on February 25, 1991.

/s/ James E. Smith
JAMES E. SMITH

APPENDIX H

LATHAM & WATKINS
David L. Mulliken (State Bar #66941)
Charles F. Weiss (State Bar #137884)
701 "B" Street, Suite 2100
San Diego, California 92101-8197

Telephone: (619) 236-1234

Attorneys for Plaintiffs

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO NORTH COUNTY JUDICIAL DISTRICT

MARGARET L. ROULETTE, S. SCOTT EMSLEY AND ROBIN S. EMSLEY, Plaintiffs, v. JAMES E. SMITH; and DOES 1 through 15, inclusive, Defendants.	Case No. N49451 COMPLAINT FOR VIOLATION OF CALIFORNIA GOVERNMENT CODE, BREACH OF IMPLIED COVENANT, BREACH OF CONTRACT, FRAUD: INTENTIONAL MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, CONCEALMENT OR SUPPRESSION OF MATERIAL FACTS AND RESCISSION (Filed Nov. 20, 1990)

Plaintiffs for cause of action against James E. Smith ("Defendant") and Does 1 through 15, inclusive, and each of them, allege as follows:

NATURE OF THE CASE

1. This is a civil action on behalf of Plaintiffs who purchased three parcels of real property (the "Parcels") from Defendant that are located in the City of Del Mar ("City"), all of which were zoned for residential use. Plaintiffs intended to construct residences on each of the parcels. Prior to the sale, Defendant represented to Plaintiffs that the Parcels were legal lots. After purchasing the parcels from Defendant, Plaintiffs began the time consuming and costly process of applying for the necessary approvals and permits from the City to allow construction of the residences. Plaintiffs have been engaged in this process for over 2½ years and have expended a significant amount of money in an effort to gain such approvals and permits.

2. The City has concluded that the Parcels Plaintiffs purchased from Defendant were illegally subdivided by Defendant and do not constitute legal lots. Consequently, the City recorded Notices of Violation on the Parcels, copies of which are marked Exhibit "A" and attached to and made part of this Complaint. Defendant knew or should have known based on information in his possession that the Parcels sold to Plaintiffs were not legal lots and therefore could not be separately sold or developed.

3. As a result of the foregoing, Plaintiffs have been defrauded, deprived of the intended use of the Parcels, and have expended large amounts of money in an effort to develop the Parcels, while Defendant has been unjustly enriched from the sale of the Parcels to Plaintiffs.

PARTIES, JURISDICTION, AND VENUE

4. The Plaintiffs are, and at all times herein mentioned were, residents of the County of San Diego, State of California.

5. Defendant is, and at all times herein mentioned was, a resident of the County of San Diego, State of California.

6. Plaintiffs do not know the true names or capacities of the Defendants sued herein as Does 1 through 15, inclusive, and therefore sue these Defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when they have been ascertained.

BACKGROUND FACTS

7. Plaintiffs purchased from Defendant what was represented to them to be separate legal lots identified as Lots "H", "I", and "J" in Block 12 of Arden Heights Unit No. 3, according to Subdivision Map No. 1285, filed in the Office of the County Recorder of San Diego County. Plaintiff Margaret L. Roulette ("Roulette") and Defendant agreed to escrow instructions for Lots I and J on June 18, 1988 (the "Roulette Agreement"), a copy of which is marked Exhibit "B" and attached to and made part of this Complaint. Defendant and Plaintiffs S. Scott Emsley and Robin S. Emsley (the "Emsleys") agreed to written escrow instructions for Lot H on March 23, 1988 (the "Emsleys Agreement"), a copy of which is marked Exhibit "C" and attached to and made part of this Complaint. Escrow for

the purchase of Lots I and J closed on June 14, 1988 and escrow for the purchase of Lot H closed on April 15, 1988.

8. Pursuant to the Roulette Agreement, Defendant executed and delivered to Plaintiff Roulette a grant deed to Lots I and J, a copy of which is marked Exhibit "D" and attached to and made a part of this Complaint.

9. Pursuant to the Emsleys Agreement, Defendant executed and delivered to Plaintiffs Emsleys a deed to Lot H, a copy of which is marked Exhibit "E" and attached to and made a part of this Complaint.

10. Pursuant to the Roulette Agreement, Plaintiff Roulette made a cash down payment in the sum of $205,000, and executed two promissory notes, the first in the sum of $360,500 payable to Defendant and secured by a deed of trust on Lot I and the second in the sum of $814,500 payable to Defendant and secured by a deed of trust on Lot J (collectively the "Roulette Trust Deeds"). A copy of the promissory notes payable by Plaintiff Roulette are marked Exhibits "F" and "G" and attached to and made a part of this Complaint. A copy of the Roulette Trust Deed for Lot I is marked Exhibit "H" and attached to and made a part of this Complaint. A copy of the Roulette Trust Deed for Lot J is marked Exhibit "I" and attached to and made part of this Complaint.

11. Pursuant to the Emsleys Agreement, Plaintiffs Emsleys made a cash down payment in the sum of $38,075.38, and executed a promissory note in the sum of $537,480.50 payable to Defendant and secured by a deed of trust on Lot H (the "Emsleys Trust Deed"). A copy of the promissory note payable by Plaintiffs Emsleys is marked Exhibit "J" and attached to and made a part of

this Complaint. A copy of the Emsleys Trust Deed is marked Exhibit "K" and is attached to and made part of this Complaint.

12. Prior to the sale of the Parcels, Defendant told Plaintiffs that the Parcels were separate legal lots. The term "legal lots" means that a parcel of land has been created in a manner consistent with the California Subdivision Map Act, Cal. Gov't Code §§ 66410 *et seq.* ("Subdivision Map Act") and, therefore, can be sold and developed. Plaintiffs relied on these assertions in deciding to purchase the Parcels. At the time Defendant made these representations, he either knew that the Parcels were not separate legal lots within the meaning of the Subdivision Map Act or asserted that the Parcels were legal lots even though he possessed no knowledge which would warrant such an assertion. Defendant made these statements with the intent to induce Plaintiffs to purchase the Parcels.

13. On information and belief, Plaintiffs allege that Defendant instructed North American Title Insurance Company, the entity selected by Defendant to prepare title insurance for the Parcels, not to disclose documents to Plaintiffs which evidenced that the County of San Diego had vacated certain alleys adjacent to the Parcels in 1925 and, therefore, that portions of the alleys should have been included as part of the Parcels. A copy of the vacation document is marked Exhibit "L" and attached to and made part of this Complaint.

14. Each of the deeds for the Parcels specifically excluded from the land conveyed by Defendant to Plaintiffs those portions of the Parcels which constituted the

adjoining vacated alleys. According to California law, the Parcels include portions of the vacated alleys which the deeds purport to expressly exclude. Plaintiffs did not know or have reason to know that a discrepancy existed between the property which Defendant conveyed to Plaintiffs and the proper description of the Parcels contained in the deeds. Furthermore, Plaintiffs did not know or have reason to know that the Parcels were not legal lots within the meaning of the Subdivision Map Act at the time they purchased the Parcels.

15. After purchasing the Parcels, and while relying on Defendant's representations that the Parcels were legal lots, Plaintiffs attempted to obtain permits and approvals from the City to improve the Parcels. Plaintiffs expended significant amounts of time and money in an effort to obtain such permits and approvals from the City.

16. On or about November 27, 1989, the City informed Plaintiffs that it would not approve Plaintiffs' applications for permits to improve the Parcels. The City informed Plaintiffs that it had concluded that the Parcels, as conveyed to Plaintiffs by Defendant, failed to conform to the Subdivision Map Act.

17. In January 1990, the City's representatives indicated that the City would consider issuing Certificates of Compliance for the Parcels pursuant to Cal. Gov't Code § 66499.35, even though the Parcels were illegal lots. Therefore, Plaintiffs applied for Certificates of Compliance for the Parcels. In September of 1990, the City concluded that it would not issue Certificates of Compliance

for the Parcels unless the Certificates included a condition that prohibited the issuance of approvals and permits for the Parcels until portions of the vacated alleys had been added to the Parcels.

18. On or about October 4 and 5, 1990, the City delivered to the Plaintiffs Notices of Intention to Record Notices of Violation which confirmed that the Parcels were illegal lots within the meaning of the Subdivision Map Act. On October 30, 1990 the City recorded the Notices of Violation against the Parcels.

19. As a result of the foregoing, Plaintiffs have been suffered inordinate harm. Plaintiffs cannot develop the Parcels because the City will not permit development of illegal lots. Furthermore, Plaintiffs would commit a misdemeanor if they sold or leased any portion of the Parcels. Plaintiffs have incurred substantial expenses while trying to improve the Parcels and while trying to obtain Certificates of Compliance from the City in order to bring the Parcels into conformance with the Subdivision Map Act. In short, the Parcels that Defendant sold to Plaintiffs were made useless by Defendant's violation of the Subdivision Map Act.

FIRST CAUSE OF ACTION

(Rescission of Property Sale Based on Violation of Subdivision Map Act)

20. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 19 as though fully set forth herein.

21. The Parcels Plaintiffs purchased from Defendant are illegal lots within the meaning of the Subdivision Map Act.

22. Pursuant to Cal. Gov't Code § 66499.32(a), Plaintiffs intend service of the Summons and Complaint in this action to serve as notice of Plaintiffs' election to rescind the sale of the Parcels and the Roulette and Emsleys Agreements.

SECOND CAUSE OF ACTION

(Damages For Sale of Property Not Conforming to the Subdivision Map Act)

23. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 22 as though fully set forth herein.

24. As a direct and proximate result of Defendant's sale of the Parcels in violation of the Subdivision Map Act, Plaintiffs have suffered damages in an amount to be proven at trial.

25. Plaintiffs may recover these damages pursuant to Cal. Gov't Code § 66499.32(b).

THIRD CAUSE OF ACTION

(Fraud: Intentional Misrepresentations, Negligent Misrepresentation, and Concealment or Suppression of Material Facts)

26. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 25 as though fully set forth herein.

27. Defendant, knowing the representations to be false, and with the intent to deceive the Plaintiffs and induce Plaintiffs into purchasing the Parcels, falsely and fraudulently represented to Plaintiffs that the Parcels were legal lots.

28. Even if Defendant did not know that the Parcels were illegal lots, Defendant's claim that the Parcels were legal lots was not warranted by information possessed by Defendant.

29. The representations made by Defendant were in fact false because the property which Defendant sold to Plaintiffs was divided in violation of the Subdivision Map Act.

30. By reason of Defendant's misrepresentation that the Parcels conformed to the Subdivision Map Act and his failure to disclose that the Parcels violated the Subdivision Map Act, Defendant has committed fraud.

31. Plaintiffs did not ultimately know the Parcels were illegal lots until October 30, 1990, when the City recorded the Notices of Violation on the Parcels.

32. Plaintiffs reasonably and justifiably relied upon the representations of Defendant by virtue of his superior knowledge concerning the legal status of the Parcels.

33. Plaintiffs will suffer substantial harm and injury unless the sale of the Parcels and Roulette and Emsleys Agreements are rescinded, and accompanying promissory notes and Roulette and Emsleys Deeds of Trust voided, in that Plaintiffs would be deprived of their bargain because unlike the property they intended to purchase, the Parcels cannot be developed or legally sold.

34. As a proximate result of Defendant's fraud and deceit, and the facts herein alleged, Plaintiffs purchased property which cannot be developed or sold, and expended considerable funds in an attempt to make the property useful, resulting in damages in an amount to be proven at trial.

35. Plaintiffs intend service of the Summons and Complaint in this action to serve as notice of Plaintiffs' election to rescind the sale of the Parcels and the Roulette and Emsleys Agreements. Plaintiffs hereby demand that Defendant restore the Plaintiffs the consideration furnished by them, specifically the sum of $1,957,480.50, plus the costs incurred by the Plaintiffs in trying to develop the Parcels and bring the Parcels into conformance with the Subdivision Map Act in an amount to be proven at trial.

36. Such acts and omissions by Defendant were done wilfully, wantonly, and in conscious disregard of Plaintiffs' rights, and were done with the knowledge that such acts and omissions would substantially injure Plaintiffs, entitling Plaintiffs to punitive and exemplary damages in the sum of at least $1,000,000.

FOURTH CAUSE OF ACTION

(Breach of Contract)

37. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 38 as though fully set forth herein.

38. Defendant agreed in the Roulette and Emsleys Agreements to transfer three legal lots to the Plaintiffs.

39. Plaintiffs fully performed all covenants and obligations and promises they agreed to perform pursuant to the Roulette and Emsleys Agreements.

40. Defendant breached the Roulette and Emsleys Agreements in that Defendant did not transfer legal lots to Plaintiffs.

41. As a result of Defendant's breach of the Roulette and Emsleys Agreements, Plaintiffs have sustained damages in an amount to be proven at trial.

FIFTH CAUSE OF ACTION

(Breach of Covenant of Good Faith and Fair Dealing)

42. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 44 as though fully set forth herein.

43. There was and is, implied in the relationship which exists between Plaintiffs and Defendant, a covenant of good faith and fair dealing where in Defendant covenanted that he would deal fairly and honestly with Plaintiffs and do nothing to interfere with, impair, or hinder the ability of Plaintiffs to enjoy the benefit of the Roulette and Emsleys Agreements.

44. Defendant has breached the implied covenant of good faith and fair dealing.

45. Defendant has failed to act honestly and fairly by misleading Plaintiffs into believing the Parcels were legal lots when Defendant knew or should have know [sic] otherwise, and by withholding information which

would have alerted Plaintiffs that they were not purchasing legal lots.

46. As a proximate result of Defendant's breach of the implied covenant of good faith and fair dealing, Plaintiffs have been damaged in an amount to be proven at trial. Such acts and omissions by Defendant were done wilfully, wantonly, and in conscious disregard of Plaintiffs' rights, and were done with the knowledge that such acts and omissions would substantially injure Plaintiffs' rights under the Roulette and Emsleys Agreements and would jeopardize Plaintiffs financially as alleged herein, entitling Plaintiffs to punitive and exemplary damages in the sum of at least $1,000,000.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray judgment against Defendant as follows:

1. For a decree that Defendant be ordered to pay Plaintiffs the following sums:

a. The down payments made by Plaintiffs to Defendant in the sum of $243,075.38;

b. The sums paid, or which will be paid, by Plaintiffs for closing costs, title insurance, casualty and liability insurance, principal and interest on outstanding obligations, taxes, fees for engineers and consultants, and miscellaneous costs, in an amount to be proven at trial;

2. For a decree that the Roulette and Emsleys Agreements be rescinded and that Plaintiffs be relieved of any liability on the promissory notes and Roulette and Emsleys Deeds of Trust;

3. For a decree that Plaintiffs be ordered to convey the Parcels to Defendant by quitclaim deed on condition that Defendant pay to Plaintiffs the sums as ordered by the judgement [sic] of this Court;

4. For a decree that any sums which this Court finds to be due to Plaintiffs from Defendant be declared a lien on the Parcels;

5. For general damages according to proof;

6. For special damages according to proof;

7. For punitive and exemplary damages in the sum of $1,000,000;

8. For costs of suit herein incurred;

9. For attorneys' fees; and

10. For such other and further relief as the Court may deem proper.

Dated: November 19, 1990

LATHAM & WATKINS
David L. Mulliken
Charles F. Weiss

By: /s/ Charles F. Weiss
Charles F. Weiss
Attorneys for Plaintiffs
Margaret L. Roulette,
S. Scott Emsley, and
Robin S. Emsley

VERIFICATION

I have read the foregoing COMPLAINT FOR VIOLATION OF CALIFORNIA GOVERNMENT CODE, BREACH OF IMPLIED COVENANT, BREACH OF CONTRACT, FRAUD: INTENTIONAL MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, CONCEALMENT OR SUPPRESSION OF MATERIAL FACTS AND RESCISSION and know its contents. I, Margaret L. Roulette, am one of the plaintiffs in the above-entitled action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

Executed on November 19, 1990, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Margaret L. Roulette
Margaret L. Roulette

VERIFICATION

I have read the foregoing COMPLAINT FOR VIOLATION OF CALIFORNIA GOVERNMENT CODE, BREACH OF IMPLIED COVENANT, BREACH OF CONTRACT, FRAUD: INTENTIONAL MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, CONCEALMENT OR SUPPRESSION OF MATERIAL FACTS AND RESCISSION and know its contents. I, Robin S. Emsley, am one of the plaintiffs in the above-entitled action. The matters stated in the foregoing

document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

Executed on November 19, 1990, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Robin S. Emsley
Robin S. Emsley

VERIFICATION

I have read the foregoing COMPLAINT FOR VIOLATION OF CALIFORNIA GOVERNMENT CODE, BREACH OF IMPLIED COVENANT, BREACH OF CONTRACT, FRAUD: INTENTIONAL MISREPRESENTATION, NEGLIGENT MISREPRESENTATION, CONCEALMENT OR SUPPRESSION OF MATERIAL FACTS AND RESCISSION and know its contents. I, S. Scott Emsley, am one of the plaintiffs in the above-entitled action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them be true.

Executed on November 19, 1990, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ S. Scott Emsley
S. Scott Emsley

ST1M9PC 2991922400 08/12/91 11:14:33
PN 299-192-24-00 CA 11001 IB60 RSC RSY HCY ADS TD 07/26/91
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13972 MERCADO ST*DEL MAR CA/ 92014
389,640 LND IMP EXC VCD 06/15/90 VCC 2 TXS T
BPP OPP EXC VAD 11/17/89 VAC 0 LLN
389,640 NET FIX EXC APP NTC LAC
BASE YR/CODE
89/S CPI-ADJ CONST-WAIVER AYR LYR
SITUS 00000 GATUNST*/ PRC 1
PRDES BLK 12*LOT U/
.00 AC UTS RMP 001343 LUC
PPN 299-192-20-00 PCA OC 002138 Y 90 TC Y 00 PR Y 00
CERTIFIED COPY OF
ASSESSMENT RECORD

/s/ Gregory J. Smith
GREGORY J. SMITH
COUNTY ASSESSOR
Date 8/12/91

Cmd1: EXIT Cmd2: ST1M90C Cmd3: PA02 Cmd4: INDEXES

ST1M9PC 2992612600 08/12/91 11:15:02
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OC 5 OD DOC 175933 DD 04/15/88 DT 1 AD
1615 LUGANO LN*DEL MAR CA/ 92014
570,292 LND IMP EXC VCD 09/15/88 VCC 2 TXS T
BPP OPP EXC VAD 04/15/88 VAC 0 LLN
570,292 NET FIX EXC APP NTC LAC
BASE YR/CODE
87/S CPI-ADJ C CONST-WAIVER AYR LYR
SITUS 00000 SERPENTINE DR*/ PRC 1
PRDES BLK 12*LOT H/
.00 AC UTS RMP 001285 LUC
PPN 299-261-21-00 PCA OC 001249 Y 89 TC Y 00 PR Y 00
CERTIFIED COPY OF
ASSESSMENT RECORD

/s/ Gregory J. Smith
GREGORY J. SMITH
COUNTY ASSESSOR
Date 8/12/91

Cmd1: EXIT Cmd2: ST1M90C Cmd3: PA02 Cmd4: INDEXES

ST1M9PC 2992612700 08/12/91 11:15:21
PN 299-261-27-00 CA 11001 IB60 RSC RSY HCY ADS TD 06/16/91
OWN NSNS ROULETTE MARGARET L TR/
OC 1 OD DOC 282487 DD 06/14/88 DT 1 AD
C/O RSR PROPERTIES*P O BOX 1611*SOLANA BEACH CA/ 92075
1,464,997 LND IMP EXC VCD 09/15/88 VCC 2 TXS T
BPP OPP EXC VAD 06/14/88 VAC 0 LLN
1,464,997 NET FIX EXC APP NTC LAC
BASE YR/CODE
88/S CPI-ADJ C CONST-WAIVER AYR LYR
SITUS 00000 SERPENTINE DR*/ PRC 1
PRDES BLK 12*LOTS I&J/
1.15 AC UTS RMP 001285 LUC
PPN 299-261-21-00 PCA OC 001249 Y 89 TC Y 00 PR Y 00
CERTIFIED COPY OF
ASSESSMENT RECORD

/s/ Gregory J. Smith
GREGORY J. SMITH
COUNTY ASSESSOR
Date 8/12/91

Cmd1: EXIT Cmd2: ST1M90C Cmd3: PA02 Cmd4: INDEXES

APPENDIX J

City of Del Mar
Staff Report

TO: Honorable Mayor and City Council

FROM: J.D. Sandoval, Planning Director
Via Gloria Curry, City Manager
Prepared by Monica Tuchscher,
Associate Planner

DATE: November 5, 1990

SUBJECT: Determination of whether to record a Notice of Violation of illegal subdivision regarding Lots H, I, J, in Block 12, of Arden Heights Unit No. 3 according to Map No. 1285.

ISSUE:

Determination of whether to record a Notice of Violation of illegal subdivision regarding Lots H, I, J, in Block 12, of Arden Heights Unit No. 3.

RECOMMENDATION:

Record Notice of Violation for the above-mentioned lots.

BACKGROUND:

Early this year, Scott Emsley and Margaret Roulette property owners of a portion of Lots H, I, J, in Block 12, of Arden Height [sic] Unit No. 3 (hereinafter referred to as "New Lots H, I, and J" or "New Lots"), filed applications for Certificates of Compliance for the "New Lots", as described above.

The purpose of a Certificate of Compliance is to determine whether a property or lot complies with the provisions of the Subdivision Map Act (Map Act). The Map Act affirms that any parcel of land created prior to March 4, 1972, shall be presumed to have been lawfully created. Therefore, staff must define what was inclusive of the lot or lots prior to March 4, 1972 and compare that information to the "New Lot's" current legal description.

In this case, in order to determine what was inclusive of the three lots in question, staff examined the grant deeds, titles, and subdivision mapping which occurred prior to March 4, 1972. The following is a history (in condensed version) of Lots H, I, J, in Block 12, of Arden Heights Unit No. 3, according to Map No. 1285:

> September 22, 1910, a subdivision was filed and recorded by the County Recorder which created Arden Heights Unit No. 3, Map #1285. At that time, the following lots (hereinafter refer to as "Old Lots") were legally created:
>
> – Lot H, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County (hereinafter refer to as "Old Lot H").
>
> – Lot I, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County (hereinafter refer to as "Old Lot I").
>
> – Lot J, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San

Diego County (hereinafter refer to as "Old Lot J").

Then on July 20, 1925, the County Board of Supervisors held a hearing to consider a petition filed by E.C. Batchelder, et al, to vacate the following alleys/roads located adjacent to the "Old Lots":

> A ten (10) foot alley running from Zapo Street to Serpentine Drive between Lots L, J, I, and Lots M, N, G.
>
> A ten (10) foot alley running from Zapo Street to Serpentine Drive between Lots N, H, and Lots O, G.
>
> A fifteen (15) foot alley running from Zapo Street to Serpentine Drive between Lots T in Arden Heights No. 4, Lot S in Arden Heights No. 3, Lot 760 in Arden Heights No. 6 and Lots J, I, H, G in Arden Heights No. 3, All three alleys mentioned above are located in Block 12 of Arden Heights No. 3.

Subsequent to the hearing, the County Board of Supervisors approved and declared the above mentioned alleys/roads

> "vacated, abandoned and discontinued". The alley vacation was then recorded by the County Recorder on July 31, 1925 (Attachment B) and the alleys/roads were united into the adjoining properties. Thus, *as of July 31, 1925, the "Old Lots" H, I, and J were inclusive of the property/area delineated as alleys/roads* above.

Staff has concluded that in 1988, upon the transfer of the property to the current owners, not all of the "Old Lot" area was conveyed. Namely, the alley portions of each of

the "Old Lots" was retain [sic] by the seller. Therefore, staff concludes that the Emsley/Roulette properties, as described in the current deeds *do not comply* and *were not* created in compliance with the provisions of the Subdivision Map Act or the City of Del Mar's Subdivision Ordinance.

Government Code section 66499.35 (b) states:

> "If a local agency determines that the real property does not comply with the provisions of this division or of local ordinances enacted pursuant thereto, it shall issue a certificate of compliance or a conditional certificate of compliance. . . . "

The function of "conditioning" a certificate of compliance is to impose any conditions which would have been applicable to the division of the property at the time the applicant acquired his or her interest in the property. Government Code section 66499.35 (b) states that a local agency may, as a condition to granting a certificate of compliance:

> " . . . impose any conditions which would have been applicable to the division of the property at the time the applicant acquired his or her interest therein, and which had been established at that time by this division or local ordinance enacted pursuant thereto, except that where the applicant was the owner of record at the time of the initial violation of provisions of this division or of local ordinances enacted pursuant thereto who by a grant of the real property created a parcel or parcels in violation of this division or local ordinances enacted pursuant thereto, and the person is the current owner of record of one or more of the parcels which were created as a

result of the grant in violation of the division or local ordinance enacted pursuant thereto, then the local agency may impose any conditions which would be applicable to a current division of the property. Upon making the determination and establishing the conditions the city or county shall cause a conditional certificate of compliance to be filed for record with the recorder of the county in which the real property is located. The certificate shall serve as notice to the property owner or vendee who has applied for the certificate pursuant to this section, a grantee of the property owner, or any subsequent transferee or assignee of the property that the fulfillment and implementation of these conditions shall be required prior to subsequent issuance of a permit or other grant of approval for development of the property.

On September 24, 1990, staff held an Administrative Hearing to consider the merits of issuing a *conditional* certificate of compliances for the "New Lots" subject to the following condition:

1. Prior to the issuance of a permit or other grant of approval for development of the properties, the portions of the alley, vacated by the County, and retained by the seller, during the 12988 sale must be acquired and added to the "New Lots" in question. Or in the alternative, a parcel map or subdivision map shall be accomplished to show the alley as separate and a part from the "New Lot".

At the end of the Administrative Hearing, the applicants representative request that the City issue a Notice of Violation on the three "New Lots" and continue the Administrative Hearing to November 13, 1990.

ANALYSIS:

The directive for issuing a notice of violation is set forth in the Municipal Code section 66499.36 as follows:

> "Whenever a local agency has knowledge that real property has been divided in violation of the provisions of the division or of local ordinances enacted pursuant to this division, it shall cause to be mailed by certified mail to the then current owner of record of the property a notice of intention to record a notice of violation, describing the real property in detail, naming the owners thereof, and stating than [sic] an opportunity will be given to the owner to present evidence. The notice shall specify a time, date, and place for a meeting at which the owner may present evidence to the legislative body or advisory agency why the notice should not be recorded. The notice shall also contain a description of the violations and an explanation as to why the subject parcel is not lawful under subdivision (a) or (b) of Section 66412.6."
>
> "The meeting shall take place no sooner than 30 days and no later than 60 days from the date of mailing. If, within 15 days of receipt of notice, the owner of the real property fails to inform the local agency of his or her objection to recording the notice of violation, the legislative body or advisory agency shall record the notice of violation with the county recorder. If, after the owner has presented evidence, it is determined that there has been no violation, the local agency shall mail a clearance letter to the then current owner of record. If, however, after the owner has presented evidence, the legislative body or advisory agency determines that the property has in fact been illegally divided, the legislative

> body or advisory agency shall record the notice of violation with the county recorder. The notice of violation, when recorded, shall be deemed to be constructive notice of the violation to all successors in interest in such property. the [sic] county recorder shall index the names of the fee owners in the general index."

Staff followed the procedures outlined above and mailed a Notice of Intention to Record a Notice of Violation to the owners of the "New Lots" in question, and set November 5, 1990 as the date which the owner/owners may present evidence as to why the notice of violation should not be recorded.

It should be noted that the owners (Emsley/Roulette) of "New Lots" H, I, and J have not filed an objection to the filing the Notice of Violation. However, the seller of the "New Lots" (Jim Smith), who holds title to a portion of the "Old Lots" did object, therefore the purpose of the administrative hearing is to allow Mr. Smith the opportunity to present evidence as to why the Notice of Violation should not be filed with the County Recorder.

RECOMMENDATION:

In conclusion, basis [sic] upon the findings outlined in the staff report, staff recommends the filing of Notices of Violation for the lots mentioned above.

APPENDIX K

RECORDING REQUESTED BY AND MAILED TO: City Clerk City of Del Mar 1050 Camino del Mar Del Mar, CA 92014	THE ORIGINAL OF THIS DOCUMENT WAS RECORDED ON OCT 30 1990 FILE/PAGE NO 90-587840 VERA L. LYLE, COUNTY RECORDER SPACE ABOVE FOR RECORDER'S USE

NOTICE OF VIOLATION
ILLEGAL SUBDIVISION

NOTICE IS HEREBY GIVEN that the following described real property was illegally subdivided:

Portion of lot H, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County.

Assessor's

Parcel Number: 299-261-26

Current owner

of record

of portion: S. Scott Emsley &
Robin Emsley

Not all of the lot area existing prior to March 4, 1972 was transferred to the current owner. Namely, the abandoned alley portions of the lot were retained by the seller.

Date: 10-30-90

Signed: /s/ M. Tuchscher
for J.D. Sandoval
Planning Director
City of Del Mar

RECORDING REQUESTED BY AND MAILED TO:

City Clerk
City of Del Mar
1050 Camino del Mar
Del Mar, CA 92014

THE ORIGINAL OF THIS DOCUMENT WAS RECORDED ON
OCT 30 1990
FILE/PAGE NO
90-587841
VERA L. LYLE,
COUNTY RECORDER

SPACE ABOVE FOR RECORDER'S USE

NOTICE OF VIOLATION
ILLEGAL SUBDIVISION

NOTICE IS HEREBY GIVEN that the following described real property was illegally subdivided:

Portion of lot 1, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County.

Assessor's

Parcel Number: 299-261-27

Current owner

of record

of portion: Margaret Roulette

Not all of the lot area existing prior to March 4, 1972 was transferred to the current owner. Namely, the abandoned alley portions of the lot were retained by the seller.

Signed: /s/ M. Tuchscher Date: 10-30-90
for J.D. Sandoval
Planning Director
City of Del Mar

RECORDING REQUESTED BY AND MAILED TO:

City Clerk
City of Del Mar
1050 Camino del Mar
Del Mar, CA 92014

THE ORIGINAL OF THIS DOCUMENT WAS RECORDED ON
OCT 30 1990
FILE/PAGE NO
90-587842
VERA L. LYLE,
COUNTY RECORDER

SPACE ABOVE FOR RECORDER'S USE

NOTICE OF VIOLATION
ILLEGAL SUBDIVISION

NOTICE IS HEREBY GIVEN that the following described real property was illegally subdivided:

Portion of lot J, in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County.

Assessor's

Parcel Number: 299-261-27

Current owner

of record: Margaret Roulette

Not all of the lot area existing prior to March 4, 1972 was transferred to the current owner. Namely, the abandoned alley portions of the lot was retained by the seller.

Signed: /s/ M. Tuchscher Date: 10-30-90
for J.D. Sandoval
Planning Director
City of Del Mar

APPENDIX L

LATHAM & WATKINS

Attorneys at Law
701 "S" Street, Suite 2100
San Diego, California 82101-8137
Telephone (619) 256-1234
FAX (619) 896-7419
TLX 390778
ELN 62783278

[Branch Offices Listing Omitted In Printing]

October 26, 1990

VIA FAX

Roger W. Krauel, Esq.
Krauel & Krauel
225 Broadway, Suite 1750
San Diego, CA 92101

Re: Recordation of Notices of Violation for Lots H, I, and J

Dear Roger:

This will confirm our telephone conversation of October 26, 1990, in which you agreed on behalf of the City of Del Mar to record today the notices of violation received by Mr. and Mrs. S. Scott Emsley and Mrs. Margaret L. Roulette concerning Lots H, I, and J of the Snakewall property. This letter will also confirm our agreement that in the event the City of Del Mar concludes during any subsequent hearing, specifically a hearing to be held on Lots owned by Mr. James Smith, that Lots H, I, and J were in fact not illegally subdivided, that the Emsleys and Mrs. Roulette will not hold the City liable in

any fashion or for any reason as a result of having recorded the notices of violation.

Please advise me immediately if this letter does not accurately reflect what was agreed to in our conversation. We thank you for your cooperation in this matter.

Very truly yours,

/s/ Allen D. Haynie
Allen D. Haynie
of LATHAM & WATKINS

cc: S. Emsley
M. Roulette
J. Kaplan
M. Tuchscher

APPENDIX M

RECORDING REQUESTED BY

AND WHEN RECORDED
MAIL THIS DEED AND,
UNLESS OTHERWISE
SHOWN BELOW, MAIL
TAX STATEMENTS TO:
NAME
S. Scott Emsley and
Robin S. Emsley
STREET
ADDRESS

CITY
STATE
ZIP

Recorded
April 15, 1988

Doc. No.
88-75433

SPACE ABOVE THIS LINE FOR RECORDER'S USE
ALL Title Order No._____
PIN.
Escrow or Loan No. 7733-C

GRANT DEED

THE UNDERSIGNED GRANTOR(s) DECLARE(s)

DOCUMENTARY TRANSFER TAX is $ CITY TAX $

[ ] computed on full value of property conveyed or

[ ] computed on full value less value of liens or encumbrances remaining at time of sale,

[ ] Unincorporated area: [xx] City of Del Mar, and

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged.

JAMES E. SMITH, an unmarried man
hereby GRANT(S) to
S. SCOTT EMSLEY and ROBIN S. EMSLEY, Trustees under that certain Declaration of Trust dated April 18, 1983

the following described real property in the city of Del Mar

County of San Diego State of California:

PARCEL 1: Lot "H" in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County.

SPECIFICALLY EXCLUDING, HOWEVER, that portion of the alley adjoining said Lot "H" as closed to public use.

RESERVING THEREFROM an easement retained by Seller over a portion of Lot "H" AS MORE FULLY DESCRIBED ON EXHIBIT "B" ATTACHED HERETO AND MADE A PART HEREOF.

PARCEL 2: A utility and sewer easement over, under, along and across that certain alley between Lots "N" and "O", "H," "I," and "N", "H" and "G," "L" and "N," and "L" and "M" in Block 12 of ARDEN HEIGHTS UNIT NO. 3, according to Map thereof No. 1285, filed in the office of the County Recorder of San Diego County, all from the public street known as Zapo Street.

PARCEL 3: An access and utility easement for the benefit of said Lot "H" AS MORE FULLY DESCRIBED ON

EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

PARCEL 4: A utility easement for the benefit of said Lot "H" AS MORE FULLY DESCRIBED ON EXHIBIT "D" ATTACHED HERETO AND MADE A PART HEREOF. Grantee, by acceptance of this Deed, agrees, for himself, his heirs, successors and assigns, to the restrictions contained in EXHIBIT "E" ATTACHED HERETO AND MADE A PART HEREOF.

Dated March 15, 1988
STATE OF CALIFORNIA)
)ss
COUNTY OF San Diego)
On April 15th, 1988 before me, the undersigned a Notary Public in and for said State, personally appeared James E. Smith personally known to me to be the person ___ whose name is subscribed to the within instrument and acknowledged that he executed the same.
WITNESS my hand and official seal.
Signature /s/ Dee Goodrich

/s/ James E. Smith
James E. Smith @4-15-88

[SEAL]
(This area for official notarial seal)

MAIL TAX STATEMENTS AS DIRECTED ABOVE.

APPENDIX N

2/19/88

Rusty Powell
City Engineer
CITY OF DEL MAR
175 Calle Magdalena
Encinitas, CA. 92024

RE: PREAPPLICATION CONFERENCE FOR DEVELOPMENT OF A SINGLE FAMILY HOME ON LOT "H" OF THE SNAKE WALL PROPERTIES.

Dear Mr. Powell,

With reference to our meeting this morning I wanted to confirm certain points of our discussion regarding the development of a single family home on Lot H. The discussion with Mr. Jones, Mr. Morrow, Mr. Sowards and yourself covered a number of issues. Overall, this lot is a buildable lot with certain conditions which are listed below.

1. **FIRE ACCESS.**

A. Provide twenty foot wide access easement to the site, granted to the City, terminating in a hammerhead turnaround, with a surface suitable for fire protection vehicles. Said surface could be asphaltic concrete, grass-crete, or concrete. The snake wall would be opened to a minimum unobstructed access of twelve feet wide and twelve feet high.

B. Extend fire hydrant service to the site from the intersection of Serpentine and Avenida Primavera and provide a loop system, if possible, in Serpentine alone, or

through an existing easement in the Snakewall properties.

2. SEWER

A private sewer lateral running from Lot H to Zapo, in the existing easements, would be acceptable and there is service capability in Zapo for Lot H. If a public sewer system were to be installed, it would be necessary to grant necessary easements to the City.

3. WATER

Water service, with adequate pressure, is available from Serpentine.

4. DRAINAGE

In so long as there was only minimal grading, runoff generated from the impervious surfaces was not redirected, and the runoff from the structure was adequately disbursed on site, no drainage improvements would be required.

5. PLANNING AND ZONING

With regard to the open space overlay zone and R1-40 zoning, there were no objections to development, provided that the home was located on the upper portions of the lot and not on the bluffs.

6. ACCESS

A twenty foot wide private access for ingress and egress was acceptable from Serpentine.

Based on our meeting, and the conditions above, I am proceeding to purchase the lot and develop plans for a single family home on Lot H. In the event that this information is not correct please contact me immediately.

Thank you for your assistance [sic] and the time you and others devoted. My family and I look forward to living in our new home on Lot H.

Sincerely,

S. Scott Emsley
4837 Rancho Grande
Del Mar, CA 92014
(619) 481-0030 Ofc.
481-5308 Hm.

CITY OF DEL MAR

PLANNING DEPARTMENT

March 4, 1988

Mr. S. Scott Emsley
4837 Rancho Grande
Del Mar, CA 92014

SUBJECT: Pre-application Conference, Lot "H", Snake-wall

Dear Mr. Emsley:

Regarding the pre-application conference that was held on February 19, 1988, the Planning Department would like to pass on the following comment from our Engineering Department.

From an engineering standpoint, the pre-application letter appears acceptable with the following exception. The Engineering Department feels that it is too early in the development process to determine that there are no drainage improvements for Lot "H". Essentially, all projects have some on-site drainage needs.

Thank you for the opportunity to comment; and if you have any further questions, please contact me at 755-9337.

Sincerely,

/s/ Chris Morrow
CHRIS MORROW
Assistant Planner

CM:bjp

cc: Rusty Powell, City Engineer

APPENDIX O

city of del mar

DEPARTMENT OF PLANNING AND COMMUNITY DEVELOPMENT

July 15, 1986

Robert L. Zajac
Hillyer and Irwin
530 B Street, 14th Floor
San Diego, CA 92101-4479

Re: Snakewall Property

Dear Mr. Zajac:

As we discussed, the City has determined that the Snakewall Property was legally subdivided in the early 1900's. These lots are considered to be legal lots of record, and are potentially buildable, subject to final review by the Department of Planning and Community Development. Some of the lots may have easement access difficulties, so individuals interested in acquiring these properties should thoroughly investigate the sites and the access.

The lots which now can be validly sold are the following:

(1) Arden Heights #3, Map #1285, recorded September 22, 1910, which sets forth Lots G, H, I, J, K, L, M, N, O, and S.

(2) Arden Heights #4, Map 1343, recorded June 8, 1911, which sets forth Lots A, B, T, and U.

(3) Arden Heights #6, Map 1592, recorded July 18, 1913, which sets forth Lots 780, 781, 782, 783, 784, and 785.

Sincerely,
/s/ Lise Strandgaard
LISE STRANDGAARD
Director of Planning and
Community Development

APPENDIX P

Order Number 767125-11

Escrow Number 1-21367

RECORDING REQUESTED BY

AND WHEN RECORDED MAIL THIS DEED AND UNLESS OTHERWISE SHOWN BELOW, MAIL TAX STATEMENTS TO:

Recorded Dec. 9, 1977
File/Page No. 77-508720

James E. Smith
2204 Ocean Front
Del Mar, CA 92014

SPACE ABOVE THIS LINE
FOR RECORDER'S USE

Parcel No. (11001) 877-003-17; 299-261-12; 299-261-13; 299-200-06;-07;08; 299-192-09;10;11; and 12.

Del Mar
(City)

TRANSFER TAX PAID
HARLEY F. BLOOM
RECORDER

CORPORATION GRANT DEED

THE UNDERSIGNED GRANTOR DECLARES
DOCUMENTARY TRANSFER TAX IS $885.50
X computed on full value of property conveyed, or

—computed on full value less value of liens or encumbrances remaining at time of sale, and HOME

BUSINESS DEVELOPMENT CORPORATION a corporation organized under the laws of the state of California For a valuable Consideration, the receipt of which is hereby acknowledged, hereby GRANTS To James E. Smith, an unmarried man all that real property situated in the County of *San Diego*, State of California, described as follows:

Lots G, H, I, J, K, L, M, N, O and S, together with the 10.00 and 15.00 foot alleys adjoining said lots are closed to public use, all in Block 12 of Arden Heights Unit No. 3, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1285, filed in the Office of County Recorder of San Diego County. Together with Lots A and B in Block 37 and T and U in Block 12, together with that portion in "Gatun Street" lying Southeasterly of the Southwesterly prolongation of the Northwesterly line of said Lot A, as said streets and alleys are closed to public use, all in Arden Heights Unit No. 4, in the City of Del Mar, in the County of San Diego, State of California, according to Map thereof No. 1343, filed in the Office of County Recorder of San Diego County. Together with Lots 780 through 785 inclusive, together with that portion of "Oriba Road" adjacent to said lots as closed to public use, all in Arden Heights Unit No. 6, in the City of Del Mar, in the County of San Diego, State of California, according to Map No. 1592, filed in the Office of County Recorder of San Diego County.

In Witness Whereof, said corporation has caused its corporate name and seal to be affixed hereto and this instrument to be executed by its ___ President and ___ Secretary thereunto duly authorized.

Dated: December 6, 1977

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

On *December 8, 1977* before me, the undersigned, a Notary Public in and for said State, personally appeared *John W. Guth,* known to me to be the ___ President, and *C.O. McEfee* known to me to be *Vice President* of the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the within instrument pursuant to its by-laws or a resolution of the board of directors. WITNESS my hand and official seal.

Signature Leticia M. Belanger
Leticia M. Belanger

Home Business Development Corporation

By _____
John W. Guth President

By _____
C. O. McEfee Secretary

[SEAL]
OFFICIAL SEAL
LETICIA M. BELANGER
NOTARY PUBLIC – CALIFORNIA
Principal Office, San Diego Co., Calif.
My Commission Exp. Dec. 11, 1990

(This area for official notarial seal)

MAIL TAX STATEMENTS TO PARTY SHOWN ON FOLLOWING LINE: IF NO PARTY SHOWN, MAIL AS DIRECTED ABOVE

Supreme Court, U.S.
FILED
OCT 20 1993
OFFICE OF THE CLERK

No. 93-488

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

v.

MARGARET L. ROULETTE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State Of California

RESPONDENTS' BRIEF IN OPPOSITION

KRISTINE P. NESTHUS, Esq.
SCALONE STIPANOV YAFFA & MEBANE
7855 Ivanhoe Avenue,
Suite 420
La Jolla, California 92037
(619) 454-3237

Attorneys for Respondents Margaret L. Roulette, S. Scott Emsley and Robin S. Emsley

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Defendant/petitioner James E. Smith ("Smith") challenges the California state courts' interpretation of California statutes as to the subdivision of California real property by a California resident. After losing a protracted battle in the state courts, Smith now attempts to manufacture a "federal issue" for review by this Court, by arguing for the first time here that he was denied due process rights under the federal Constitution. His arguments are not only completely meritless, they are untimely.

As a threshold matter, this Court has no jurisdiction because Smith's purported "federal question" was not raised in or decided by the state courts in this action. Further, the state court judgment rests on well-established and accepted principles of state law based on sound public policy. Smith was afforded every opportunity below to present his case. There are no substantive or procedural due process issues in this case worthy of review by this Court. Plaintiffs/respondents Margaret S. Roulette, S. Scott Emsley, and Robin S. Emsley (the "Roulette Plaintiffs") therefore respectfully request that this Court deny Smith's Petition.

OPINIONS BELOW

Smith has attached as Appendices to his petition to this Court (the "Smith Petition") the state court opinions in this action.[1]

JURISDICTION

This Court has no jurisdiction to review the state court judgment below. Smith is raising the federal "due process" issue for the first time in this Court. He did not plead violation of due process in his answer to the complaint in this action. (Appendix G to Smith Petition.)[2] He did not raise this issue in opposition to the Roulette Plaintiffs' summary judgment motion. The trial court's opinion granting that motion did not mention due process. (Appendix F to Smith Petition.) Nor did Smith raise any due process issue in the California Court of Appeal, either on his original appeal or in his petition for rehearing, or in the California Supreme Court.[3] (*See* Appendix E

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[1] The same subdivision issue is raised in Smith's Petition for Writ of Certiorari in Case No. 93-359, where a different trial court hearing Smith's separate mandamus action against the City of Del Mar reached the same result as the trial court in this action.

[2] A defendant's failure to plead any ground alleged in avoidance of the complaint precludes admission of evidence as to that ground at trial. Cal. Civ. Proc. Code § 431.030(b); *Carranza v. Noroian*, 240 Cal. App. 2d 481, 49 Cal. Rptr. 629 (1966). Smith never sought relief from that waiver.

[3] Smith did present an issue at the appellate level regarding "separation of powers," but his sole authority was the California Business and Professions Code. (*See, e.g.*, Appendix E-15 through E-18 and Appendix B-2 to Smith Petition.)

to Smith Petition.) Therefore, neither of those courts' opinions mention due process. (Appendices A and B-27 through B-44 to Smith Petition.)

Not only did Smith fail to preserve any "due process" claim in the lower courts, there are independent and adequate state grounds which support the judgment against him. For both of those reasons, this Court has no jurisdiction over this case (as more fully addressed below).

STATEMENT OF THE CASE

Smith owns certain real property in the City of Del Mar, California (the "City"), which was subdivided pursuant to a recorded map showing individual lots and a network of streets and alleys running through the subdivision. Smith sold three of these lots to the Roulette Plaintiffs (the "Lots") by deeds which specifically excluded from the conveyances the streets and alleys adjoining those Lots. When the City refused to allow development of the Lots as illegally subdivided, the Roulette Plaintiffs sued Smith for rescission. The trial court granted them summary judgment.

The Court of Appeal affirmed. The California Subdivision Map Act provides that a property owner may not convey less than an entire lot without prior governmental approval. Cal. Gov't Code §§ 66426, 66428. In order to decide whether Smith conveyed entire lots to the Roulette Plaintiffs, the Court of Appeal was required to determine the boundaries of those lots prior to the sale. To do so, the Court considered the subdivision map of the property

and the prior deeds, and applied the presumption of California Civil Code Sections 831 and 1121 that ownership of property bounded by a street includes ownership to the middle of adjacent roadways unless the contrary is shown.

The Court of Appeal found that Smith, despite his over 100 exhibits and extensive briefing and oral argument before the trial court, had not presented any evidence to rebut the statutory presumption. The lots conveyed to Smith by his predecessor therefore included the adjoining roadways by operation of law, and Smith's exclusion of these roadways from the deeds to the Roulette Plaintiffs, without first obtaining governmental approval, violated the California Subdivision Map Act. (Appendix B to Smith Petition, pp. 36-38.) Based on these findings, the Court of Appeal affirmed. (*Id.* p. 42.) Smith's petition for rehearing was denied. His petition for review to the California Supreme Court was also denied. (Appendix A to Smith Petition.)

The Smith Petition incorrectly states that there has been a "taking" of Smith's property, and that his "real property [was] ordered to be given to Respondents." (Smith Petition p. 6.) To the contrary, the state courts merely held that if Smith wanted to re-subdivide the property by moving around the lot lines (i.e., taking roadway portions from one lot and adding them to another), he was required by the Subdivision Map Act to obtain *prior* governmental approval, *as well as* express his intention to do so in the deeds. The trial court did not order Smith to give any property to the Roulette Plaintiffs. Instead, they were awarded rescission of the property sale and money damages against Smith.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT LACKS JURISDICTION OVER THIS CASE

A. THE PURPORTED FEDERAL ISSUE NOW RAISED BY SMITH WAS NEVER RAISED IN OR DECIDED BY THE STATE COURTS

This Court has repeatedly held that a federal question cannot be raised for the first time in this Court.

> In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below.

Yee v. City of Escondido, ___ U.S. ___, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153 (1992).

As this Court held in *Board of Directors of Rotary Internat'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987):

> When " ' "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." ' " . . . [citations omitted]

In the present action, none of the state court decisions addresses the due process issue. It is therefore assumed that the issue was not properly raised below. Smith in his Petition has not even attempted to show

otherwise.[4] In fact, he cannot. There is no reason to make a rare exception here. This Court has no jurisdiction over and should decline review of this case.

B. THIS COURT ALSO LACKS JURISDICTION BECAUSE THE STATE COURT JUDGMENT IN THIS CASE WAS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS

The present case deals solely with state law. Where this Court concludes that the state ground for a state court judgment is both independent and adequate to support that judgment, "this court will not assume jurisdiction of the case," (*Klinger v. Missouri*, 80 U.S. 257 (1872)), inasmuch as "our jurisdiction fails" (*Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)).

Smith quarrels with the California Court of Appeal's application of California Civil Code Sections 831 and 1112 to this case. That application is consistent with a long line of California authority applying those sections to determine the boundaries of lots bordered by roadways, particularly in plotted subdivisions. *See, e.g., Anderson v. Citizens Sav. & Trust Co.*, 185 Cal. 386, 197 P. 113 (1921); *Baker v. Ramirez*, 190 Cal. App. 3d 1123, 1132, 235 Cal. Rptr. 857 (1987); *Safwenberg v. Marquez*, 50 Cal. App. 3d 301, 308, 123 Cal. Rptr. 405 (1975); *Neff v. Ernst*, 48 Cal. 2d

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[4] Smith's petition thus does not (indeed cannot) comply with Rule 21.1(h) of this Court, which requires that a petition for review of a state court judgment demonstrate that the federal question asserted "was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

628, 635, 311 P.2d 849 (1957). The cases which Smith himself cites, from both California *and* other jurisdictions, recognize and apply this rule. (Smith Petition pp. 10-15.)

This statutory presumption is supported by well-recognized public policies. First, "[t]he law of real property abhors the proliferation of gores and strips under separate ownership. . . . " *Murray v. Title Ins. & Trust Co.*, 250 Cal. App. 2d 248, 254, 58 Cal. Rptr. 273 (1967). See also *Safwenberg*, 50 Cal. App. 3d at 306 ("[t]he policy behind the law is to avoid ownership in land in strips and gores"). Several other policy considerations are served, as well:

> [T]here is no object in the grantor's retaining a narrow strip of land which is of little or no use or value to him when separated from the adjoining land [citation]; that the value of the land to a purchaser would be greatly affected if the abutting street were not included in the conveyance [citation]; that such a rule will guard against litigation and disputes between owners of land adjacent to public highways [citation]; that retention of such a narrow strip of land would retard the improvement and further alienation of the adjoining property [citation]; and that "if no other reason could be assigned of this rule . . . the general understanding of the people, and the extensive and immemorial practice of claiming and acquiescing in such rights, ought to have great weight."

Hixson v. Jones, 253 Cal. App. 2d 860, 865, 61 Cal. Rptr. 883 (1967) (quoting *Los Angeles City High School Dist. v. Swensen*, 226 Cal. App. 2d 574, 579-580, 38 Cal. Rptr. 214, 218 (1964) (citations omitted)).

The use of this presumption is not unique to California.

> "The principle *recognized almost everywhere,* either as a general rule of construction or as a rebuttable presumption, is that if land abutting on a highway is conveyed by a description or designation apt or effective to cover it, and the grantor owns the fee to the center of the highway, the grantee takes title to the center line of the highway as part and parcel of the grant, unless an intention to the contrary sufficiently appears [footnotes deleted]. (Emphasis added.)

12 American Jurisprudence 2d *Boundaries* § 38 ("12 Am. Jur.") pp. 577-78 n. 9 (1964 and 1990 Supp.). *See also* 11 C.J.S. *Boundaries* § 35, p. 580 n. 57 (1938 and 1990 Supp.)

This Court itself recognized this common law principle over 125 years ago:

> It is a familiar principle of that law [applicable to dedications of land], that a grant of land bordering on a road or river, carries the title to the centre of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines.

Banks v. Ogden, 69 U.S. 57, 68 (1864).

In the present action, the lots in question were part of a larger parcel of property subject to a subdivision map. That map showed certain designated lots with adjacent roadways which were *not* designated as separate or strip lots. These roadways were subsequently vacated. There was no intent shown by Smith's predecessors in title to

separate the roadways from the lots. These facts are similar to the facts in numerous prior cases where the California courts have held that lots in subdivisions include the adjoining roadways. *E.g., Anderson,* 185 Cal. at 393; *Baker,* 190 Cal. App. 3d at 1132; *Safwenberg,* 50 Cal. App. 3d at 308.[5]

Given the facts in this case, the statutory presumption, the public policies against the creation of strip lots and in favor of orderly development, and the prior decisions on similar facts by the state's appellate courts, the California courts properly determined that the lots which Smith could convey to the Roulette Plaintiffs without further governmental approval included the adjoining roadways as a matter of state law. Smith's exclusion of those roadways from his sale of the Lots to the Roulette Plaintiffs *without* such approval constituted an illegal subdivision, also as a matter of state law. Given those independent and more than adequate state grounds for the state court judgment herein, this Court is without jurisdiction to review this case.

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[5] Smith argues that the state courts improperly applied the presumption because his deeds to the Roulette Plaintiffs expressly excepted the roadways. He is considering the wrong time frame. The Subdivision Map Act prohibits an owner from selling less of a parcel than he owns *just prior to the sale being challenged.* Smith cannot rely on his later deeds to the Roulette Plaintiffs to make that determination; those deeds came too late in time. It was in fact those very deeds which effected the improper "splitting" of Smith's property under the Map Act.

II. SMITH'S DUE PROCESS RIGHTS WERE NOT VIOLATED IN THE STATE COURT PROCEEDINGS

A. SMITH'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY APPLICATION OF THE STATE STATUTORY PRESUMPTIONS REGARDING OWNERSHIP OF ROADWAYS TO THIS CASE

Smith tries to create a "federal question" based on the "rational connection" test of *Mobile, Jackson & Kansas City Railroad Company v. Turnipseed, Administrator,* 219 U.S. 35, 43 (1910). *Mobile* recognized the general validity of evidentiary presumptions such as the one involved in the present case.

> Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is *but to enact a rule of evidence, and quite within the general power of government.* Statutes, National and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. [citations omitted] (Emphasis added.)
>
> . . .
>
> The only legal effect of the inference [in the statutes at issue] is to cast upon the railroad company the duty of producing some evidence to the contrary. When that is done the inference is at an end, and the question of negligence is one for the jury upon all of the evidence. *In default of such evidence, the defendant, in a civil case, must lose, for the* ***prima facie*** *case is enough as matter of law.* (Emphasis added.)

Mobile, 219 U.S. at 42-43.

Like the state statutes in *Mobile*, the California statutes at issue in this case are merely rules of evidence well within the power of California's legislature to enact, and its courts to apply. The presumption of Sections 831 and 1112 simply cast upon Smith the duty to produce evidence to rebut that presumption. When he failed to do so, the Roulette Plaintiffs were entitled to prevail as a matter of law.

Very little is required to pass the "rational connection" test in *Mobile*.

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be *some rational connection* between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.
>
> If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.

Mobile, 219 U.S. at 43.

In the present action, the presumption that the lots deeded to Smith included the adjoining roadways because there was no contrary intent shown by the original subdivider was not unreasonable or arbitrary. As detailed above, this presumption is based on well-recognized considerations of public policy. Its application to this case furthers not only those policies, but also those behind the Subdivision Map Act, which was designed "to regulate and control the design and improvement of subdivisions." *Pratt v. Adams,* 229 Cal. App. 2d 602, 605, 40 Cal. Rptr. 505 (1964). "[O]rdinarily one who lays out and sells lots in a subdivision intends to part with title to the center of the streets." *Graber v. City of Sacramento,* 2 Cal. 2d 432, 41 P. 2d 543, 545 (1935). There is nothing arbitrary about assuming that a subdivider would not create (or the governmental agency approve) strip lots which would not be owned by the adjacent property owners. Smith was given ample opportunity to present facts to rebut the presumption. He failed to do so.

Smith argues that the presumption cannot be applied at all in a Subdivision Map Act case. However, the California courts have applied this presumption in various types of cases involving boundary issues. *E.g., Taylor v. Continental Southern Corp.,* 104 Cal. App. 2d 425, 233 P. 2d 577, 582 (1951) (action to require defendant to account to plaintiff for her proportionate interest in proceeds under oil and gas lease); *Porter v. City of Los Angeles,* 182 Cal. 515, 189 P. 105, 106 (1920) (trespass action). Smith has not cited any decision of this Court or any federal Court of Appeals holding that the presumption *cannot* be applied

in a case such as the present one.[6] The language of the statutes does not expressly limit their application, nor is there any logical reason not to apply the presumption wherever assistance is needed in determining property boundaries. The state courts' use of the presumption to make that threshold determination in this case was completely reasonable and rational.

In any event, the question of when and how the presumptions should be applied is itself a matter of state law. Smith is simply unhappy with the application of state law to purely state issues. That unhappiness does not create a federal question.

B. THE STATE COURT DECISIONS DID NOT RENDER THE STATE STATUTES AT ISSUE UNCONSTITUTIONALLY VAGUE

Smith also argues in his Petition that the California Subdivision Map Act provisions are unconstitutionally vague as applied by the state courts in this case. He argues first that under Section 66424 of the Map Act the state courts can only consider the county assessor's

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[6] Smith cites one federal district court case, which would neither take precedence over the state courts' pronouncement of state law, nor create a federal "conflict" to be resolved by this Court. (Smith Petition pp. 10, 12) (citing *United States v. 5.324 Acres of Land*, 79 F. Supp. 748 (S.D. Cal. 1948) (incorrectly identified by Smith as a Ninth Circuit Court of Appeals case)). Smith also cites *Speer v. Blasker*, 195 Cal. App. 2d 155, 158, 15 Cal. Rptr. 528 (1961). The Court of Appeal decision in the present case controls over that in *Speer*.

records to determine whether property has been improperly subdivided. Both California's attorney general and the state Court of Appeal in this case have rejected this approach, based on policy and practicalities.

> Reference [in section 66424 of the Subdivision Map Act] to the "latest county assessment roll" provides a simple measure for determining whether title to a particular parcel of property has been transferred from one owner to the next. Such reference was *not* intended to permit the actions of the County Assessor to, in effect, negate the filing of a map under the Map Act.
>
> . . .
>
> The function and purpose of the County Assessor is to raise revenue and *not* to regulate the division of land. . . . A County Assessor will quite often combine or renumber parcels for valid reasons entirely separate from the purposes of the Subdivision Map Act. (citations omitted)

59 Cal. Op. Att'y Gen. 581, 583 (1976) (cited in Appendix B to Smith Petition, p. 32 n 3.) (assessor's records showed only one lot where recorded subdivision map showed three).

The rationale for this rule is obvious:

> If the administrative action of an assessor could be relied upon by a landowner in the circumstances under consideration, it could be argued that a proper "division" by the owner and its attendant submission of a map and approval by the proper local agency would be unnecessary to sell one of the areas given a separate parcel number by the assessor. Such an

> occurrence, however, would remove local planning control over the development of the property and thereby frustrate the very purposes of the Act.

62 Cal. Op. Att'y Gen. 147, 149 (1979) (assessor's records showed two separate parcels where recorded subdivision map showed only one).

In the present action, the assessor's maps showed various separate roadway parcels which were not shown as separate lots on the recorded subdivision map. Both generally and in this case, assessors' records simply cannot be relied on to determine Subdivision Map Act issues. The state courts' reasonable refusal to rely on such records in this case did not deny Smith due process.

Smith's further argument that the state courts created uncertainty as to deeds referencing subdivision maps is equally meritless. California Government Code Section 66499.32 allows a seller to comply with the Act by simply referencing a recorded subdivision map. Smith did not avail himself of that safe haven; his deeds to the Roulette Plaintiffs did not merely reference the applicable recorded map, but went on to specifically *exclude* the roadways from the lots. (Appendix B to Smith Petition, pp. 39-40.) Given those facts, this case does not create any unconstitutional uncertainty as to the application of Section 66499.32.

C. THE STATE COURTS DID NOT DENY SMITH DUE PROCESS BY UTILIZING THE SUMMARY JUDGMENT PROCEDURE

Finally, Smith argues that he was denied due process because the Roulette Plaintiffs were granted summary

judgment. A California state trial court may grant summary judgment where it determines that "there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Cal. Civ. Pro. Code § 437c(a).[7]

> Section 437c is purely a procedural statute, doubtless designed to protect the rights of the plaintiff, in actions of the character specified in the statute, from the harassing delays that ordinarily accompany evasive, spurious, and meritless defenses. It likewise promotes and protects the administration of justice, . . .

Bank of America v. Oil Well Supply Co., 12 Cal. App. 2d 265, 55 P. 2d 885, 888 (1936). The summary judgment procedure has been upheld by this Court against constitutional challenges. *See e.g., Fidelity & Dep. Co. v. United States*, 187 U.S. 315 (1902). There is nothing for a jury to decide where the evidence is "so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

In the present action, Smith points to nothing in the record that even raises an inference that this common procedure was applied in such a way as to deny him "due process." The state courts determined that there were no issues of fact raised by Smith below and that the case could be decided as a matter of law. That determination, based on the particular facts of this case and the state

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[7] This language is almost identical to that in Federal Rule of Procedure 56(c); substantively the standard for granting summary judgment is the same in the two rules.

courts' application of state law and procedure, is not one which this Court should review.

III. THIS CASE IS OF NO NATIONAL INTEREST OR IMPORTANCE, AND DOES NOT CREATE ANY CONFLICT TO BE RESOLVED BY THIS COURT

This action involves California residents, statutes, public policies, and real property. The principles involved are longstanding and well recognized. The decision below turned on the unique facts of this suit. Because the Court of Appeal opinion was not published, it is improper for that decision to be cited or relied upon as precedent in other state actions. California Rule of Court 977. The decision appealed from therefore does not even have precedential value in California, let alone other jurisdictions. There is no conflict between the state court decision in this case and any decisions of this court or of any federal Court of Appeals. In sum, there is simply no reason why this Court should have any interest whatsoever in this case.

CONCLUSION

This Court has no jurisdiction to review the state court judgment in this action. Smith's purported "federal question" is raised for the first time in this Court. The state court judgment is based on application of long-established, well-reasoned California law and precedent. The application of those principles in the present action in no way denied Smith due process under the federal Constitution. There is no conflict with federal decisions to

be resolved. This case has no national import or interest. In fact, Smith's Petition is so frivolous that the Roulette Plaintiffs respectfully request that such petition not only be denied by this Court, but also that the Roulette Plaintiffs be awarded double attorneys' fees and costs incurred, pursuant to this Court's Rule 42.2.

Dated: October 20, 1993

Respectfully submitted,

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No. 93-488

In The

Supreme Court of the United States

October Term, 1993

JAMES E. SMITH,

Petitioner,

v.

MARGARET L. ROULETTE, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Appellate District, Division One, State of California

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REPLY TO BRIEF IN OPPOSITION

I

THE ISSUE PRESENT HEREIN HAS BEEN PRESENTED TO AND RULED UPON BY ALL COURTS BELOW

From its beginning this case has involved the primary legal question regarding the proper application of the principle recognized almost everywhere, either as a general rule of construction or as a rebuttable presumption, that if land abutting on a highway is conveyed by a description or designation apt or effective to cover it, and the grantor owns the fee to the center of the highway, the grantee takes title to the center line of the highway as part and parcel of the grant *unless an intention to the*

contrary sufficiently appears. This principle is codified in California as rebuttable presumptions at California Civil Code §§ 831 and 1112.

From the earliest motions, through summary judgment, the appellate court as well as the Petition for Review to the California Supreme Court, the objection to the manner of the application of §§ 831 and 1112 has been steadfastly maintained and pursued by Petitioner. The purpose for pleading the issues below is stated as follows:

> "The purpose of the rule is to inform promptly the trial judge of possible errors so that he may have an opportunity to reconsider his ruling and make any changes deemed desirable . . . The rule is adhered to save in exceptional cases where the obvious result would be a plain miscarriage of justice, [citations] or inconsistent with substantial justice." [citations]. *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (1976).
>
> "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), the Court explained that this is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Singleton v. Wulff*, 428 U.S. 106 at 120 (1975).

The claims and issues presented in the instant Writ are precisely the same claims and issues which were

presented to the courts below. The record as a whole both expressly and by clear implication shows that Petitioner was denied due process of the law when the lower courts ruled that: (1) the presumptions of section 831 and 1112 could only be rebutted by a showing of a contrary intent on the part of the original subdivider of the property; and (2) that the "lot" described in the California Subdivision Map Act at § 66499.52(a) was not the "lot" to be referred to when deciding the illegality of divisions of property as proscribed by the Act.

That the foregoing points and issues were argued and briefed extensively in the lower courts is beyond dispute. That the issues presented herein involve a federal claim is similarly beyond legal dispute. See *Iran v. Immigration and Naturalization Service*, 656 F.2d 469 at 471 (1981) wherein application of a presumption to the wrong factual setting is a due process violation. For a final judgment of a state court to be reviewable by this Court "the record as a whole [must] show either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493 at 496-497 (1981). The issues presented herein were presented squarely to the state courts.

But, even stronger support for this Court to consider the issues presented here is the fact that these issues are purely questions of law.

> "It is frequently said that appellate courts should not consider issues raised for the first time on appeal. [citations]. But, even if this rule is pertinent here, *it can give way when a pure question of law is involved* and a refusal to consider it would result in a miscarriage of justice."

> [citations] *Martinez v. Mathews*, 544 F.2d 1233 at 1237 (1976). Italics supplied.

Even if the issues herein were presented for the first time in this Court, the fact that they involve purely questions of law should serve as sufficient reason for review. But as noted, this is not the first time Respondents have seen and opposed these issues thereby precluding, or at the very least severely vitiating, any claim that this is the first time these issues have been raised.

The issues are properly before this Court.

II

THIS COURT DOES NOT LACK JURISDICTION BASED UPON THE INDEPENDENT AND ADEQUATE STATE GROUNDS TEST

Respondents' argument misconceives the issue. Petitioner has from the beginning, the same as now, maintained that it is the judiciary's conduct in misapplying the presumptions of §§ 831 and 1112 which has resulted in the due process violations. In fact, Respondents acknowledge that it is the application by the lower courts "which is consistent with a long line of authority applying those sections to determine the boundaries of lots bordered by roadways, particularly in plotted subdivisions." (See Respondents' Brief in Opposition at p. 6).

The issue giving rise to the federal due process claim under the Fourteenth Amendment, § '1' is not, as Respondents suggest, the application of §§ 831 and 1112 in a determination of ownership rights in the adjacent roadway. Rather, the due process violation results from the

application of those sections to a factual situation completely lacking the necessary elements required for their application.

Only in a factual situation involving a dispute over ownership of the adjacent roadway can the principle embodied within §§ 831 and 1112 be applied once the *grant* has been examined for a *contrary intent*. This is precisely what the U.S. Supreme Court case of *Banks v. Ogden*, 69 U.S. 57 at 68 (1864) held, as has numerous other federal and state cases nationally.

The welter of theories proffered by Respondents in their arguments with the ensuing obfuscation can be visioned away by the application of a relatively simple legal proposition. Given that the presumptions of §§ 831 and 1112 are merely aids in the construction of grants, if the grant(s) is clear about what land is being conveyed, then what need is there for application of the presumptions? There is none.

> "That the action of state courts and of judicial officers in their official capacities is to be regarded as actions of the state within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1 at 14 (1947).

III

RESPONDENTS HAVE BY THEIR OWN ARGUMENT SHOWN THE INAPPLICABILITY OF THE PRESUMPTIONS TO THIS CASE

Respondents point out that Petitioner's due process rights were not violated by application of the state statutory presumptions regarding ownership of roadways. (See Resp. Opp. Br. p. 10.). As pointed out, the presumptions of §§ 831 and 1112 go only to the issue of *ownership of the roadways.*

Ownership has never been in dispute in this case. Therefore, application of the presumption and the resultant court ruling requiring rebuttal to come from evidence of the original subdivider's intent is total misapplication of §§ 831 and 1112 and it is unconstitutional.

Furthermore, application of the presumptions to a California Subdivision Map Act case is in addition to being logically untenable, legally improper.

The Subdivision Map Act provides the definition of a "lot" at § 66499.52(a). Respondents and the lower courts have attempted to utilize the definition of a "technical" lot found in the §§ 831 and 1112 cases to supplant the one provided for in the Act; and then by way of genie like incantations declare that it is that "technical" lot, rather than the Map Act lot, which shall be used to determine whether or not there has been an illegal subdivision of a "lot" as proscribed by the Map Act at § 66424.

There is no *"rational connection"* between Civil Code §§ 831 and 1112, and the Subdivision Map Act with regards to the issue of illegal subdivisions of land.

Respondents further attempt to bolster an unbolsterable argument by suggesting that the presumptions can be applied to the Map Act because they have been applied to "various types of cases involving boundary issues." (See Resp. Opp. Br. p. 12).

The cases cited by Respondents involve a dispute over ownership of the adjacent roadway. This is precisely the same dispute the presumptions serve to resolve as pointed out by Respondents at page 10 of their brief. That dispute is lacking here.

Respondents, however, once again misconceive the issue by suggesting that the cases involve boundary issues. Nothing could be further from the legal point. Boundary issues are resolved in California by resort to Code of Civil Procedure § 2077 (6) wherein is stated that one refers to the final subdivision map to determine the boundaries of the described lot(s). When ownership of adjacent roadways is questioned Civil Code §§ 831 and 1112 controls. If there is no question of ownership then there is no occasion to apply the presumptions, it is that simple.

Applying the presumptions to a fact situation such as the one at hand, which does not involve a dispute as to *ownership* of the adjacent roadway, violates Petitioner's due process rights.

IV

SECTION 66424 OF THE SUBDIVISION MAP ACT IS THE LAW; THE LOWER COURT'S REFUSAL TO FOLLOW THE CLEAR AND UNAMBIGUOUS LANGUAGE IS A VIOLATION OF DUE PROCESS.

The case at hand resulted in a determination by the courts below that Petitioner's "contrary intent" as

expressed in the deeds to Respondents, constituted an "illegal subdivision" of property. It seems axiomatic that in order to find that there has been an illegal subdivision the court below had to find that there was first a "subdivision."

Section 66424 of the Map Act mandates, when determining if a subdivision has occurred, that the "latest county assessment roll" be utilized to identify the particular property which is alleged to have been illegally subdivided. Petitioner has simply asked the lower courts to follow that statutory language.

Respondents contend without authority that a state court can refuse for reasonable reasons to rely on legislative authority as codified in the statutory law. Apparently the lower courts believed this also because they did not follow the mandate of § 66424.

The attorney general opinions relied upon by both Respondents and the lower courts to support their refusal to follow § 66424 have nothing to do with the issue of whether or not there was an "illegal subdivision."

As this Court and all legal experts are aware, Attorney General Opinions are very specialized and are addressed exclusively to the particular issue presented for the opinion.

As stated, Petitioner merely argued, and correctly so, that before he could be adjudged in violation of the Map Act for an "illegal subdivision," he must first have been deemed to have effectuated a "subdivision." This determination must begin with § 66424 and its language. The courts below chose arbitrarily to ignore the language of

that section and in so doing egregiously violated Petitioner's Due Process rights.

Similarly, § 66499.32, next to the last paragraph, exempts a seller from the harsh remedy of rescission when the property sold is referenced in a final map. Respondents acknowledge, as did the lower courts, that Petitioner refererced the final map. However, the inclusion in the deeds of a "contrary intent," as provided for at Civil Code §§ 831 and 1112, is treated by the courts below as language which changes the import of § 66499.32, next to the last paragraph. That holding has never been made in California and cannot be made without offending due process. The application of the statute by the courts below has rendered Map Act § 66424 and § 66499.32, next to the last paragraph, not only vague but also meaningless.

CONCLUSION

This case is illustrative of countless others in this state and perhaps across the country wherein a litigant, particularly one in pro per, is afforded less than his "day in court." The issues involved in this case involve purely questions of law and are easily decided without need for further briefing. The statutes and case law, which are nationwide from both state and federal courts, are abundantly clear.

Failure of the courts below to follow and apply that law to the facts of this case has resulted in a callous and

blatant violation of Petitioner's due process rights. Rights to which thus far the courts below have been purblind.

Respectfully submitted,

Dated: October 29, 1993

/s/ James E. Smith
Propria Persona